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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 86

HURON PORTLAND CEMENT COMPANY, ETC., APPELLANT,

vs.

CITY OF DETROIT, ETC., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

FILED JUNE 1, 1959
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SUPREME COURT OF THE UNITED STATES

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[fol. 2]

State of Michigan
In the Circuit Court for the County of Wayne
In Chancery
No. 544-318

Huron Portland Cement Company,
a Michigan corporation, Appellant

v.

City of Detroit, a Michigan municipal corporation, Benjamin Linsky, Chief, Bureau of Smoke Abatement; P. J. Lareau, Appellees

Notice of Appeal to the Supreme Court of the United States—Filed April 9, 1959

I. Notice is hereby given that Huron Portland Cement Company, a Michigan corporation, the appellant above named, hereby appeals to the Supreme Court of the United States from the final decree of the Supreme Court of the State of Michigan affirming the decree of the Circuit Court for the County of Wayne, In Chancery, entered in this action on January 12, 1959.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257 (2).

II. The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Bill of complaint
2. Answer
3. Pre-trial statement

[fol. 3] 4. Transcript of the testimony, including Exhibits 2 and A.

5. Opinion of the Circuit Court for the County of Wayne, Michigan, In Chancery

6. Decree dismissing bill of complaint filed by appellant

7. Opinion of the Supreme Court of Michigan

8. Decree of the Supreme Court of Michigan

9. Notice of appeal to the Supreme Court of the United States

III. The following questions are presented by this appeal:

1. Where Congress has by Statute 46 U.S.C.A., Chapter 14, provided for the inspection and licensing of vessels engaged in interstate and foreign commerce on the Great Lakes and appellant's vessels, including their boilers, which are engaged in interstate commerce, have been inspected by the United States Coast Guard and have been granted permission to navigate on the Great Lakes and have been enrolled and licensed by the Treasury Department of the United States to carry on coasting and foreign trade, is the Smoke Ordinance of the City of Detroit, Michigan valid as to said vessels, when such Ordinance provides for the inspection of the same boilers and prohibits their use, and are the penalty provisions of said Ordinance valid as to appellant's vessels when the prohibited smoke cannot always be prevented by the boilers inspected, approved and licensed by the United States?

2. Where the Smoke Ordinance of the City of Detroit, Michigan provides for the inspection of combustion equipment and prohibits use of certain kinds of boilers and [fol. 4] equipment on vessels engaged in interstate and foreign commerce on the Great Lakes, and prohibits the emission of smoke which cannot be prevented at all times with boilers and equipment commonly used on the Great Lakes, does such Ordinance unduly burden interstate and foreign commerce in matters where uniformity is necessary under the Commerce Clause of the United States Constitution, Article I, Section 8, Cl. 3?

Beaumont, Smith & Harris, Attorneys for Huron Portland Cement Company, Appellant, 1100 Ford Building, Detroit 26, Michigan, Woodward 2-1903.

Dated: April 8, 1959

Proof of Service (omitted in printing).

[fol. 5] [File endorsement omitted]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
IN CHANCERY
No. 514318

[Title omitted]

BILL OF COMPLAINT—Filed March 19, 1956

Let a temporary injunction issue as prayed in a sub'd a of the prayer.

Frank FitzGerald, Circuit Judge.

[fol. 6] Now comes Huron Portland Cement Company, a Michigan corporation, plaintiff herein, and shows unto this Honorable Court as follows:

1. It is a corporation organized and existing under and by virtue of the laws of the State of Michigan and has its principal place of business in the City of Detroit, Wayne County, Michigan.

2. The City of Detroit is a municipal corporation organized and existing under and by virtue of the laws of the State of Michigan. Benjamin Linsky is Chief of the Bureau of Smoke Abatement of the Department of Building and Safety Engineering of said City of Detroit. The defendant, P. J. Lareau, is an Inspector of said Bureau of Smoke Abatement.

3. Plaintiff is engaged in the business of manufacture [fol. 7] and sale of cement, having a mill at Alpena, Michigan with distributing plants at Detroit, Saginaw and Muskegon, Michigan, Toledo and Cleveland, Ohio, Buffalo and Oswego, New York, Duluth, Minnesota, Milwaukee and Green Bay, Wisconsin.

4. Plaintiff transports bulk cement from its mill at Alpena, Michigan to its various distributing plants above referred to by water and for that purpose has a fleet of vessels consisting of S.S. John W. Boardman, S.T. Crapo, Samuel Mitchell, M/V Paul H. Townsend and S.S. E. M. Ford. M/V Paul H. Townsend is a diesel powered vessel. S.S. John W. Boardman and S.T. Crapo are equipped with hand fired scotch marine boilers. S.S. John W. Boardman has two boilers each with two doors and one steam-air jet over each door. S.S. S.T. Crapo has three boilers each with two doors and two steam-air jets over each door. S.S. Samuel Mitchell operated periodically last year. S.S. E. M. Ford did not operate last year.

5. During the 1955 shipping season, the S.S. S.T. Crapo docked at Detroit 22 times for a total number of 526.8 hours, the duration of the stays varying from 2.9 hours to 34.4 hours, the average length being 23.9 hours. The S.S. John W. Boardman during the same time docked at Detroit 25 times for a total of 405.7 hours, the duration of the stays varying from 24.4 hours to 6.1 hours, the average length being 16.2 hours. During this same time the M/V Paul H. Townsend docked at Detroit 22 times for a total number of 311.0 hours, the duration of the stays varying from 8.6 hours to 22.9 hours, the average length being 14.1 hours.

6. On the hand fired vessels it is necessary to keep up full steam while the vessels are docked and unloaded at Detroit. On each watch (every four hours) the fire is [fol. 8] cleaned. On such occasions it is impossible to prevent smoke from the S.S. John W. Boardman and S.T. Crapo of the kind prohibited by Ordinance No. 167-E of the City of Detroit.

7. Plaintiff has cooperated with the Bureau of Smoke Abatement of the City of Detroit in an attempt to eliminate excessive smoke from its hand fired vessels and did install steam air jets at the suggestion of the said Bureau of Smoke Abatement, and has done all that can be done to reduce the amount of smoke on hand fired scotch marine boilers.

8. Congress under the Constitution of the United States is given full and complete authority and power to regulate and control foreign and interstate commerce and Congress under such authority has provided that all vessels navigating the Great Lakes shall be subject to the navigation laws of the United States. The navigation laws of the United States cover the construction, equipment and operations of vessels and provide for an annual inspection of such vessels by the United States Coast Guard. Plaintiff's fleet is engaged in foreign and interstate commerce and navigates the Great Lakes and is inspected annually and approved by the United States Coast Guard.

9. The City of Detroit has a smoke ordinance, so-called, being Ordinance No. 167-E. The defendants claim that said ordinance is applicable to plaintiff's fleet even as to smoke, which cannot be prevented, with the present boilers on certain of the vessels, which boilers have been approved by the United States Coast Guard. There are now pending in Recorders Court of the City of Detroit, Traffic and Ordinance Division, two cases against plaintiff and others, being numbered K-996-600 and K 996-601. In case No. [fol. 9] K 996-600 plaintiff and the Captain and Chief Engineer of the S.S. John W. Boardman, on the complaint of defendant, P. J. Lareau, are charged with allowing the emission of dense smoke from the S.S. John W. Boardman's boiler stacks for a period of nine minutes on a certain day. In case No. K 996-601 the plaintiff and the Captain and Chief Engineer of the S.S. S. T. Crapo on the complaint of defendant, P. J. Lareau, are charged with allowing the emission of dense smoke from the S.S. S. T. Crapo's boiler stack for a period of 9¾ minutes on a certain date. On information and belief plaintiff alleges and charges that defendants do not claim that the emission of the smoke referred to in the two said cases was the result of improper firing or improper use of the equipment upon said vessels. Plaintiff alleges and charges the fact to be that on the occasions referred to in the said cases the firing was proper and the equipment was properly used and the emission of the smoke complained of could not have been prevented with the equipment on the vessels.

10. Section 3.2 of said Ordinance provides that any person, firm or anyone acting in behalf of said person or firm violating any provision of the Act, shall upon conviction be subject to a fine of not more than $100.00 or imprisonment in the Detroit House of Correction for a period of not more than 30 days, or to both such fine and imprisonment in the discretion of the Court. Each day that a violation of the Ordinance is continued or permitted shall constitute a separate offense punishable as above set forth.

11. Plaintiff shows that the defendants have threatened to enforce the said ordinance against it and against the officers on its vessels even where the emission of the objectionable smoke cannot be prevented, and plaintiff fur- [fol. 10] ther shows that the defendants have threatened to issue warrants for the arrest of the officers of its fleet, and plaintiff further shows that the said ordinance is not applicable as to its vessels, except in those cases where the emission of objectionable smoke is caused by improper firing or through the improper use of the equipment upon such vessels.

12. Plaintiff shows that it will suffer irreparable injury and it will be subject to continued harassment and a multiplicity of suits unless the defendants are enjoined from attempting to enforce said Ordinance No. 167-E against plaintiff and against its officers and members of its crews, except where the emi sion of the objectionable smoke is caused by improper firing or by the improper use of the equipment upon such vessels.

13. The matters here involved are in excess of One Hundred Dollars ($100.00) and plaintiff is without remedy, except in a court of equity.

Wherefore, plaintiff prays:

(a) That this Court pending a hearing in this cause and until further order, restrain and enjoin the defendants, their agents, employees, counsellors, attorneys and solicitors, and each and every of them, from the further prosecution of the two cases now pending against plaintiff and

others in the Recorders Court for the City of Detroit, Traffic and Ordinance Division, and from issuing any tickets or warrants for arrest or in any manner attempting to enforce said Ordinance No. 167-E of the City of Detroit against plaintiff, the officers and members of the crews of its vessels, unless the emission of said smoke be caused [fol. 11] by improper firing or by the improper use of the equipment upon said vessel.

(b) That this Court determine and decree that Ordinance No. 167-E is inapplicable, unreasonable and unconstitutional in respect to plaintiff, except where the emission of smoke is caused by the improper firing or the improper use of the equipment upon said vessels.

(c) That the defendants and each of them be permanently enjoined from enforcing or attempting to enforce said Ordinance No. 167-E against plaintiff, officers and members of the crew of its vessels, except where the dense smoke is caused by improper firing or improper use of the equipment upon said vessel.

And the plaintiff may have such other and further relief as may be just and equitable.

Huron Portland Cement Company, By Paul H. Townsend, President.

Duly sworn to by Paul H. Townsend, jurat omitted in printing.

[fol. 12] [File endorsement omitted]

[fol. 13]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
IN CHANCERY
No. 544,318

[Title omitted]

ANSWER OF THE CITY OF DETROIT, A MUNICIPAL CORPORATION, BENJAMIN LINSKY, CHIEF, BUREAU OF SMOKE ABATEMENT, AND P. J. LAREAU, INSPECTOR—Filed April 3, 1956

Now Come the City of Detroit, a municipal corporation, Benjamin Linsky, Chief Smoke Inspector of the Department of Buildings and Safety Engineering of the said City of Detroit, and P. J. Lareau, an inspector therein, defendants herein, and for answer to plaintiff's bill of complaint, respectfully represent as follows:

1. Answering paragraph one, defendants admit the allegations therein contained.

2. Answering paragraph two, defendants admit the allegations therein contained.

3. Answering paragraph three, defendants not having sufficient knowledge or information upon which to base a belief, neither admit nor deny the allegations therein contained and therefore leave plaintiff to its proofs.

4. Answering paragraph four, defendants admit the allegations therein contained.

5. Answering paragraph five, defendants not having sufficient knowledge or information upon which to base a belief, neither admit nor deny the allegations therein contained and therefore leave plaintiff to its proofs.

[fol. 14] 6. Answering paragraph six, whether or not it is necessary to keep up full steam while the vessels are unloaded and whether or not the fire is cleaned every

four hours, defendants not having sufficient knowledge or information upon which to base a belief thereon, neither admit nor deny such allegations and therefore leave plaintiff to its proofs. Defendants deny the allegation that it is impossible to prevent the emission of smoke from the said vessels of the kind prohibited by the said Ordinance No. 167-E, the Smoke Abatement Ordinance of defendant City of Detroit, to which public record reference is hereby expressly prayed as if specifically herein set forth, and aver that the elimination of said unlawful emission of smoke is not unavoidable.

7. Answering paragraph seven, defendants admit that in conferences with representatives of plaintiff relative to violations by the said vessels of the said Smoke Abatement Ordinance, that the said representatives had asked what could be done to reduce the excessive smoke and were advised by defendant Linsky that overfire steam/air jets were known to be methods for reducing the excess, but that such were not considered a cure-all and in his opinion such methods would not be adequate enough to permit the said vessels to meet the requirement of the said Smoke Abatement Ordinance. Defendants deny the allegation that plaintiff has done all that can be done to reduce the amount of smoke on said boilers and aver that the said unlawful emission of smoke contrary to the said Ordinance is not unavoidable.

8. Answering paragraph eight, defendants admit that the Constitution of the United States grants to Congress the power to regulate interstate and foreign commerce but aver that such does not withdraw from the State and municipalities power to legislate in respect to their local or internal concerns, and that any reasonable exercise of their police power is valid provided that such does not unduly burden interstate or foreign commerce. Defen- [fol. 15] dants further aver that the provisions of the said Smoke Abatement Ordinance do not unduly burden the interstate and foreign operations of plaintiff's said vessels, and that such provisions are a reasonable, proper and valid exercise of the delegated police power of defendant City and are good and sufficient in law.

Defendants further aver the said inspection and approval by the said United States Coast Guard in accordance with the said Federal Navigation Laws embraces only such regulations for the protection of vessels, their passengers, crews and freights and such laws do not provide for the protection of persons and property on land including regulation of fuel and smoke producing characteristics of equipment as a result of its use. Defendants deny the allegation that the said United States Coast Guard approved the boilers of the said vessels as to their operation and emission of smoke.

9. Answering paragraph nine, defendants admit that their claims that the provisions of the said Smoke Abatement Ordinance are applicable to plaintiff's said fleet of vessels, but deny the allegation that the said unlawful emission of smoke therefrom cannot be prevented and also deny that the said boilers were approved by the said United States Coast Guard as to their operation and emission of smoke, and aver that the elimination of said unlawful emission of smoke is not unavoidable.

Defendants admit further that the said two cases are now pending in the said Recorder's Court, Traffic and Ordinance Division; that at the time of the stated violation on the SS John W. Boardman it was found that the said equipment was properly used, but as to the said SS S. T. Crapo the said defendant inspector Lareau was refused access to the vessel and defendants cannot state whether or not the said equipment was properly used during the period of the stated violation. Defendants deny the allegation that the emission of the smoke complained [fol. 16] of could not have been prevented, and aver that plaintiff is bound to comply with the requirements of the said Smoke Abatement Ordinance.

10. Answering paragraph ten, defendants admit the allegations therein contained.

11. Answering paragraph eleven, defendants admit that they intend to enforce the provisions of the said Smoke Abatement Ordinance as they legally apply to plaintiff's vessels, and aver that the said provisions thereof are

applicable as to plaintiff each and every time it permits its vessels to emit smoke in excess of the regulations of the said Ordinance. Defendants further aver that the said emission of the smoke by the said vessels as charged in the said complaint was, and the continuance thereof by plaintiff in its vessels is, a public nuisance thereunder.

12. Answering paragraph twelve, defendants deny the allegations therein contained.

13. Answering paragraph thirteen, defendants deny the allegations therein contained and aver that from the allegations in this and in other paragraphs of plaintiff's bill of complaint, there is no actual or threatened act or acts on the part of the defendants of such character as to cause irreparable injury; that the plaintiff has not shown sufficient facts to confer jurisdiction on a court of equity and that it has an adequate remedy at law.

Wherefore, Defendants further deny that plaintiff is entitled to the relief prayed for in its bill of complaint and pray that the same be dismissed.

City of Detroit, a municipal corporation, Benjamin Linsky, Chief Smoke Inspector of the Department of Buildings and Safety Engineering of the City of Detroit, P. J. Lareau, Inspector of the Department of Buildings and Safety Engineering of [fol. 17] the City of Detroit, Defendants, by Paul T. Dwyer, Corporation Counsel, By Arthur L. Barkey, Assistant Corporation Counsel, Attorneys for Defendants, 1010 City-County Building, Detroit 26, Michigan, Telephone: WOodward 5-4200 Ext. 359.

Duly sworn to by Arthur L. Barkey, jurat omitted in printing.

[fol. 18] [File endorsement omitted]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
IN CHANCERY
No. 544,318

[Title omitted]

Pre-Trial Statement—Filed June 28, 1956

Session of June 26, 1956.

Present: Hon. Frank B. Ferguson, Circuit Judge.

APPEARANCES:

Beaumont, Smith & Harris, 1100 Ford Bldg., Attorneys for Plaintiff.

Paul T. Dwyer and Arthur L. Barkey, 1010 City-County Bldg., Attorneys for Defendants.

[fol. 19] Plaintiff claims that it is in the business of manufacturing and selling of cement and that it transports bulk cement from its mill in Alpena by water to various destinations throughout the United States, and for that purpose owns a fleet of vessels, which vessels are equipped with certain types of boiler, and that during the 1955 shipping season they had to dock in Detroit 22 times, staying from three to 34 hours at a time, and that on the hand fired vessels it was necessary to keep up full steam while said vessels were docked in Detroit, and that on such occasions it is impossible to prevent smoke of the kind prohibited by Ordinance 167-E of Detroit.

Plaintiff claims that it has attempted in all manner with the City of Detroit to reduce the amount of smoke, but that it has not been able to do so to the satisfaction of the City of Detroit.

Plaintiff claims that Congress under the Constitution of the United States has full authority and power to regulate and control foreign and interstate commerce, and that

Congress has provided that all vessels navigating the Great Lakes shall be subject to the navigation laws of the United States, and that said laws cover the construction, equipment and operations of the vessels and provide for an annual inspection on such vessels by the United States Coast Guard.

The defendants claim that said ordinance is applicable to plaintiff's fleet even as to smoke which cannot be prevented with the present boilers on certain of the vessels, which boilers have been approved by the United States Coast Guard.

[fol. 20] The City of Detroit has instituted two cases in the Traffic and Ordinance Division of the Recorder's Court against plaintiff, charging it with allowing emission of dense smoke from its vessels.

The plaintiff claims that the defendants have no authority to enforce said ordinance against the plaintiff, and it claims that the ordinance is not applicable to said vessels because the emission of smoke is not caused by improper firing or other improper use of the equipment, and therefore they bring this action to enjoin the prosecution of the two cases in the Traffic and Ordinance Division of the Recorder's Court of the City of Detroit, and to enjoin the City from enforcing said ordinance against it.

Plaintiff also asks that this ordinance be declared inapplicable, unreasonable and unconstitutional, except where smoke is caused by improper firing or the improper use of the equipment.

The defendants deny the claims of the plaintiff and claim that said ordinance is applicable and that the defendant has violated the same, and that it is unconstitutional, and that they are entitled to enforce said ordinance against the plaintiff.

Frank B. Ferguson, Circuit Judge.

[File endorsement omitted]

[fol. 21]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

IN CHANCERY

No. 544-318

[Title omitted]

Transcript of Testimony—Filed July 12, 1957

Proceedings had and testimony taken in the above-entitled cause before Honorable George E. Bowles, Circuit Judge, at Detroit, Michigan, on January 10, 1957.

APPEARANCES:

Beaumont, Smith and Harris, By: Alfred E. Lindbloom, Esq., Appearing on behalf of Plaintiff.

Paul T. Dwyer, Esq., Corporation Counsel, By: John F. Hathaway, Esq., Assistant Corporation Counsel, Appearing on behalf of the Defendants.

* * * * * * *

[fol. 22] JOSEPH F. STENGLEIN, was thereupon called as a witness on behalf of the Defendant, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Hathaway:

Q. What is your name?

A. Joseph F. Stenglein.

Q. Where do you live?

A. Route 1, Box 290, Miamisburg, Ohio.

Q. What is your present occupation?

A. I am an executive vice president and general manager of the Dayton Automatic Stoker Company.

Q. How long have you worked with your present company?

A. I became associated with this company on May 1, 1955.

Q. Prior to May of 1955, what other companies did you work with? In particular, stoker companies?

A. I was the sales manager and connected in the engineering division of the Canton Stoker Corporation in Canton, Ohio.

Q. Could you tell me further how long have you been in the stoker business?

A. I have been in the stoker business since 1931, starting here in the City of Detroit.

Q. In your occupation with the stoker business have you become familiar with the requirements of the smoke [Vol. 23] abatement ordinance of the City of Detroit?

A. Yes, I am familiar with the smoke ordinance.

Q. In your present position as vice president and general manager of Dayton Stoker Company what are your duties?

A. My duties have been entirely aligned with the marine field and I handle all of the contract negotiations, I am responsible for the selection and general engineering functions of the equipment we propose to provide on vessels. I do the survey work and after the layup season has commenced or has proceeded I then spend my time on the vessels, supervising the installations and then at the start of the sailing season, after fit-out, I generally sail on the vessels that have our equipment installed.

Q. At the present time are you installing any of your own underfeed stokers in any ships that are navigating the Great Lakes?

A. We have contracts for installation of stokers on eight scotch marine fired vessels, seven of them or six of them are in American ports and two in Canadian ports and we have contracts for two installations in water tube boilers.

Q. Did you state how many underfeed stokers you have already installed prior to this year?

A. We have stoker fired since 1951, layup season in '51-'52, 23 vessels on the Great Lakes.

Q. 23 vessels?

A. Yes.

[fol. 24] Q. Do you know the steamship Crapo?

A. Yes, I am somewhat familiar with the Crapo.

Q. Have you been aboard the Crapo?

A. I boarded the Crapo, I believe, it was either the last week of August or first week of September last, out in Lake Huron, while she was at anchor about three miles from the port of Alpena.

Q. Do you know whether or not an underfeed stoke could be installed aboard the steamship Crapo?

A. Yes, an underfeed stoker could be installed, or an underfeed stoker installation could be made on that vessel.

Q. Assuming, from your experience in handling stoker equipment and installing such equipment aboard marine vessels, do you know if such a stoker as would be necessary to be installed aboard the Crapo were installed and properly operated, would you know whether such equipment would result in that equipment complying with the smoke abatement code of the City of Detroit?

A. The equipment makes it possible to operate smokelessly or within the qualifying smoke, let's say, it would make it possible to operate within the scope of the International Joint Commission's No. 1, objective and the objectives set up by the City of Detroit.

Q. In their smoke abatement code.

A. That is correct.

Mr. Hathaway: That is all.

* * * * * * *

[fol. 25]

State of Michigan:
In the Circuit Court for the County of Wayne
In Chancery
No. 544-318

[Title omitted]

Opinion—April 17, 1957

Plaintiff manufactures and sells cement, with a mill at Alpena, Michigan, and distributing plants at Detroit,

Saginaw and Muskegon, Michigan, Toledo and Cleveland, Ohio, Buffalo and Oswego, New York; Duluth, Minnesota and Milwaukee and Green Bay, Wisconsin. It maintains a fleet of vessels to transport bulk cement from the Alpena mill to the distributing plants, the fleet consisting of the steamships John W. Boardman, S. T. Crapo, Samuel Mitchell, E. M. Ford, and the motor vessel Paul H. Townsend. An additional steamship, E. C. Collins, will be added to its fleet within a year or two. All of the vessels with the exception of the motor vessel Paul H. Townsend, which is diesel powered, are equipped with hand-fired scotch marine boilers.

[fol. 26] Steamships John W. Boardman and S. T. Crapo are self unloaders, the power being supplied by boilers; the Samuel Mitchell has its unloading equipment operated by electricity from shore installations; only three docks have such shore installations so the Samuel Mitchell calls only at these ports. The E. M. Ford has a diesel motor which powers the unloading equipment.

The City of Detroit's smoke abatement ordinance, No. 167-E, provides that it shall be unlawful within the city for any person, firm or corporation to permit the emission of smoke of a density equal to or greater than density described as No. 2 on the Ringlemann Chart, with the exception that smoke equal to No. 2 is permitted for a period or periods aggregating four minutes in any 30 minutes, and smoke equal to No. 3 on the Ringlemann Chart is permitted for a period or periods aggregating three minutes in any 15 minutes when building a new fire or the like.

The ordinance provides for annual inspection of combustion equipment or furnace used, with some exceptions, and makes it unlawful in Section 2.16 to use such equipment without a certificate of operation which issues only after inspection. Section 2.20 provides that after any owner has been previously notified of three or more violations within any consecutive twelve-month period, the commissioner shall serve a notice upon the owner and shall seal the equipment unless the commissioner finds that adequate corrective means have been employed to correct the unlawful emission. A fine of $100 or imprison-

ment in the Detroit House of Correction for a period of [fol. 27] not more than thirty days, or both, such fine and imprisonment, are provided. Each day that a violation of the ordinance is continued or permitted shall constitute a separate offense.

On December 20, 1955, two suits were started in the Recorders Court for the City of Detroit, Traffic and Ordinance Division, naming the company as defendant as well as Kenneth Sanchagrin, Captain, and Arthur Johnson, Chief Engineer, of the S. S. Crapo; J. Burke, Captain of the S.S. John W. Boardman; Edward Pugh, Chief Engineer, of the Boardman. Suit K 996-600 charged that the John W. Boardman emitted smoke from its stack for a period of nine minutes between 10:42 AM and 11:02 AM, on December 12, 1955, while docked at the foot of Riopelle Street in the City of Detroit, and suit No. K 996-601, charged the S.S. Crapo emitted dense smoke for a period of 9¾ minutes between 11:49 AM and 12:03 PM, the same day at the same location.

Plaintiff herein brought suit to enjoin the City of Detroit from prosecution of its two suits in Recorders Court and an order was entered against the city to "desist and refrain from the further prosecution of the two cases now pending against plaintiff and others" and "from issuing any tickets or warrants for arrest or in any manner attempting to enforce said ordinance No. 467-E" against "plaintiff, the officers, members of the crews of its vessels, unless the emission of said smoke be caused by improper firing or by improper use of the equipment upon said vessel."

[fol. 28] It is conceded that the equipment on the John W. Boardman was properly used but the City cannot state whether the equipment was properly used on the S. T. Crapo since representatives of the City were refused admission to board this vessel.

It is agreed it is impossible to prevent emission of the kind of smoke prohibited by the smoke ordinance if the vessel is equipped with hand-fired scotch marine boilers. The Boardman has two boilers each with two doors and one steam air jet over each door. The Crapo has three boilers, each with two doors and one steam air.

jet over each door. The steam jets being installed at the suggestion of Benjamin Linsky, former Chief of the Bureau of Smoke Abatement for the City.'

Testimony showed also that the plaintiff used a chemical in an attempt to reduce the smoke. Plaintiff urges it has done everything that it could possibly do with the equipment it has to prevent the emission of smoke. It was shown on trial that the fleet is subject to periodic inspection by the coast guard, which issues a search of inspection. The Crapo in 1955, docked at Detroit twenty-two times for an average docking time of 23.9 hours and the Boardman docked at Detroit 25 times that year with an average stay of 16.2 hours. Both vessels were constantly engaged in interstate and foreign commerce during this period.

Plaintiff claims that the smoke abatement ordinance is unconstitutional as to it except in those instances where the objectionable smoke is caused by improper firing or by the improper use of the equipment on the vessel.

[fol. 29] Has Congress Pre-Empted the Field?

Plaintiff argues that Congress has pre-empted the field through the enactment of elaborate and detailed regulations of steam vessels. *46 U.S. Code Annotated*, Sec. 932 Sup., provides that the coast guard shall inspect, before such vessels are put into service and at least once every two years thereafter, the boilers on unfired pressure vessels and appurtenances thereto; the propelling and auxiliary machinery, electrical apparatus and equipment of all vessels are subject to inspection.

It is argued that since Congress has validly enacted such statutes and regulations, a state or municipality may not pass a statute or ordinance covering the same field. *Kelly* v. *Washington*, 1937, 302 U.S. p. 1. Hand-fired scotch marine boilers have been approved by the coast guard. Smoke of the kind prohibited by the ordinance cannot be avoided, hence the ordinance prohibits the use of a hand-fired scotch marine boiler.

The City, it urges, requires a certain kind of equipment to comply with its ordinance, other and different equipment than that which the Congress has provided may be used.

Reference is made also by analogy to the *Boiler Inspection Act*, Secs. 22-34 of Title 35, *U.S. Code Annotated*, relating to the inspection of railroad locomotives. *Napier v. Atlantic Coastline Railroad*, 1928, 272 U.S. 605.

[fol. 30] The City, on the other hand, urges that the Congress has not enacted laws which provide for the protection of persons and property on land, including regulations of fuel and smoke-producing characteristics of equipment as a result of its use, and that, therefore, there is no conflict with federal regulations and the ordinance. There are devices and appliances which, if installed, would enable the plaintiff to comply, and this compliance may be required.

Under the Home Rule Act, MSA 5.20732 and 5.2083, the police power of Detroit as a home rule city is of the same general scope and nature as that of the State and the ordinance is not directed, as are the federal regulations, to the protection of the vessel, its passengers, crew and freight. *Morgan v. Virginia*, 90 Law Ed. ——, 165 ALR 574. This is a case, it is urged, where Congress has not acted, and although the ordinance affects interstate commerce it is valid.

Court's Holding

The Court has reviewed the authorities cited in the excellent briefs of the parties, and it is our holding that the federal Congress has not pre-empted this particular field. The constitutional grant to Congress of the power to regulate interstate commerce, it has frequently been held, does not forestall all state action and does not prevent a state from legislating on a matter of local concern, even though interstate commerce may be indirectly and incidentally affected, provided the Congress has not seen fit to enact superseding legislation. *15 CJS*, Commerce, Sec. 11, p. 268. *Cheyboygan Lumber Co. v. Delta Transportation Co.*, 100 Mich. 16. *Burrows v. Delta Transportation* [fol. 31] *Co.*, 106 Mich. 582, *Smith v. Alabama*, 124 U.S. 465, *Nashville, C. & St. Louis Railway Co. v. Alabama*, 128 U.S. 96, 177 U.S. 584, *H. P. Welch & Co. v. State of New Hampshire*, 306 U. S. 79.

These cases are constructions of statutes and ordinances affecting railroads and motor vehicles and are in point, the Court believes, as authority for the validity of the ordinance so far as the doctrine of federal pre-emption is concerned.

The language of the United States Supreme Court in the Welch case, which involved a New Hampshire statute declaring unlawful the operation on state highways of motor vehicles for specified transportation by drivers who have been continuously on duty for more than twelve hours, is persuasive.

It cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. In construing federal statutes enacted under the power conferred by the commerce law of the Constitution, it should never be held that Congress intends to supersede or suspend the exercise of the reserve powers of the state, even where that may be done, unless and except so far as its purpose to do so is clearly manifested.

Congress has not seen fit to regulate the emission of smoke by vessels in interstate commerce so far as such emission affects persons and property on land. Congress, [fol. 32] therefore, has not pre-empted this particular field so as to exclude state regulation.

Does the Commerce Clause of the United States Constitution Itself Preclude the Enactment of Detroit's Smoke Abatement Ordinance?

Plaintiff argues that a city other than Detroit could pass a smoke ordinance which would prohibit the use of even oil equipment, and other municipalities could pass even different and conflicting ordinances with which it would be impossible for plaintiff to comply. It is a field, therefore, it is urged, where uniformity is necessary in a constitutional sense in accomplishing a permitted purpose. *Morgan* v. *Virginia*, supra. Where uniformity is necessary, it is said, even though Congress has not acted, the Constitutional clause, or the power given by that clause

to Congress, pre-empts or occupies the field and precludes a state or municipality from legislating in respect to anything requiring uniformity.

It would cost roughly $70,000 to equip either the Boardman or the Crapo with stokers, and at least $300,000 each to equip them with oil burning equipment. So the burden upon interstate commerce is very substantial and it is prohibitive if other cities pass conflicting or different ordinances. *Southern Pacific* v. *Arizona*, 1915, 325 U.S. 761. *Kelly* v. *Washington*, supra.

Plaintiff has cited a portion of the Supreme Court opinion in the Kelly case which represents a good statement of its position:

> [fol. 33] "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on. But it does not follow that in all respects the state act must fail.
>
> * * * * * *
>
> "If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises."

Plaintiff urges that the congressional regulation of motor driven vessels is much less complete than that of a steam

vessel; that even though the regulation of motor driven tugs was very incomplete, the Supreme Court indicated a state could not impose particular standards as to design, equipment and operation because those requirements, if imposed at all, must be through the action of Congress, which can establish a uniform rule.

The City of Detroit argues, on the other hand, that the smoke abatement code is not such a law as requires uniformity of regulation. Reference is made to Public Act 159, enacted by the Federal Congress in 1955, wherein it is provided in Section 1:

> [fol. 34] "That in recognition of the danger to public health and welfare, injury to agricultural crops and livestock, danger to, and danger of property and hazards to air and ground transportation, from air pollution, it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the states and local governments in controlling air pollution."

Reference is also made to Volume 2, U.S. Code; *Congressional News*, 1955, pp. 2459 and 2461, states:

> "The bill does not propose any exercise of police power by the Federal Government and no provision in it invades the sovereignty of States, counties, or cities. There is no attempt to impose standards of purity.
>
> * * * * *
>
> "Moreover, unlike the water-pollution field in which a similar board now exists, instances of troublesome interstate air pollution are few in number and no federal legal control over interstate air pollution is currently proposed."

Reliance is placed upon *Atlantic Coastline Railroad* v. *Georgia*, 234 U.S. 290, construing a Georgia law requiring railroad locomotives operating on the main lines to be equipped with electric headlights of 300 watt power and to have reflectors of a certain dimension, wherein the Supreme Court stated in upholding the law said:

"The requirements of a state, of course, must not be arbitrary or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state in the exercise of a similar power may not impose the same regulation."

Here a congressional Act had provided for locomotive brakes, ladders, grab irons and other safety requirements. [fol. 35] Reliance was similarly placed on certain motor vehicle cases: *Morris* v. *Duby*, 274 U.S. 135; *Maurer* v. *Hamilton*, 309 U.S. 598, as well as state regulations of seagoing vessels, *Kelly* v. *Washington*, supra.

Summarizing these cases the City argues that the Supreme Court will not hold a state or local law invalid because (1) different states would require different devices, or (2) the fact that a state may change the law requiring further changes in equipment, or (3) because the Federal Government has entered the field, unless the local law is proved to be in direct conflict with the federal regulation.

Court's Holding

The Court has reviewed the authorities cited by the parties and concludes that the constitutional control by the Federal Government of interstate commerce does not preclude a smoke abatement ordinance such as here involved where the Federal Congress has not seen fit to pass specific legislation calculated to protect property and persons on land, as opposed to regulations for the protection of crews and passengers as well as vessels and freight on vessels in interstate commerce.

While it is conceivable that uniformity of regulation through an act of Congress might be desirable, it is not a subject on which local authority may not legislate to meet local needs. It is readily conceivable that local situations require different and particular provisions depending upon the needs and the problems encountered by the local authorities.

[fol. 36] The state regulatory measures upheld as to vessels in interstate commerce and as to railroads and motor vehicles in interstate commerce incline the Court

to such a view: Smoke abatement does not, at this stage of scientific development, admit of only one system or plan of regulation but is a subject, it is believed, which requires diversity of treatment to meet local exigencies.

Is the Smoke Abatement Ordinance a Valid Exercise by the City of Detroit of Its Police Power?

It is well established that a considerable discretion is vested in legislative authority to determine not only what the interests of the public require but what measures are necessary for the protection of these interests. New subjects may be embraced within the police power as changing conditions require. *People* v. *Sell*, 310 Mich. 305, 316.

Considerable latitude is allowed for differences of view and possible peculiar conditions. *Safee* v. *City of Buffalo*, 198 NYS p. 649; *Cady* v. *City of Detroit*, supra.

> "The court is required, if it can consistently do so, to give to the provisions such a reasonable construction as will sustain it. It has no right to invade the legality province. Its power is confined to those cases in which a municipal ordinance is clearly and manifestly made to appear to be unreasonable or oppressive in its operation. (*Building Comm.* v. *Kunin*, 181 Mich. 611.)

The Court may concern itself only with the question of whether the legislative authority, assuming it has the power to enact a regulation, has so arbitrarily and capriciously exercised that power as to make the regulation [fol. 37] unreasonable, in deprivation of the constitutional rights of the complaining parties. *Red Star Motor Drivers' Assn.* v. *Detroit*, 234 Mich. 398.

The emission of smoke has been subject to lawful regulations for many years. *People* v. *The Detroit White Lead Works*, et al., 82 Mich. 471. *People* v. *Lewis*, 86 Mich. 273; *People* v. *Detroit, Belle Isle & Windsor Ferry Co.*, 187 Mich. 177.

The general subject matter having been regulated lawfully, the question here is whether the particular regulation, establishing a standard of proscribed smoke emission, namely, "density equal to or greater than the density of No. 2" of the Ringlemann Chart is permissible, and reasonably related to the purposes of the ordinance. This stand-

ard has been sustained in the State of New Jersey. *Atlantic City* v. *France*, 65 Atl. 894, affirmed, 70 Atl. 163. This case on appeal, however, restated the old law that a common law nuisance must still be proved to convict under the ordinance.

The case of *Board of Health of Weehawken Twp.* v. *New York Central R.R. Co.*, 90 Atl. 2d. 729, recognized the proposition that if is not necessary to prove that air pollution results in a public nuisance in order to have it prohibited by ordinance, and upheld the standard of No. 2 of the Ringlemann Chart as a reasonable standard for proscribed smoke, even though the particular activity does not result in a public nuisance.

[fol. 38] Court's Holding

It is the view of this Court that the ordinance here, making unlawful the emission of smoke of a certain density is necessary and reasonable, and a valid exercise of local police power.

Scientific development in the field of smoke abatement, it is believed, has reached that point where a legislative authority may determine that smoke of a particular density should be prohibited in the interests of the safety, health and welfare of the general public. This exercise of legislative judgment should not be subject to judicial supervision unless plainly beyond the legitimate exercise of police power. We do not believe that Detroit's smoke abatement ordinance is an arbitrary or unreasonable exercise of police power.

That conformity to the requirements established by the City will require the discontinuance by plaintiff of some of its present equipment does not render the ordinance constitutionally offensive. *People* v. *Consolidated Edison Co., of New York*, 116 NYS 2d, 555; *Northwestern Laundry* v. *Des Moines*, 239 U.S. 486, 60 Law Ed. 396; *Barrows* v. *Delta Transportation Co.*, supra.

It is, therefore, held that Ordinance 167-E, of the City of Detroit is constitutional.

A permanent injunction is denied.

George E. Bowles, Circuit Judge.

Dated: April 17, 1957.

[fol. 40] [File endorsement omitted]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

IN CHANCERY

No. 544-318

[Title omitted]

DECREE AND ORDER DISMISSING BILL OF COMPLAINT—
May 1, 1957

At a Session of said Court held in the City-County Building in the City of Detroit, County of Wayne, State of Michigan, on May 1, 1957.

Present: Honorable George E. Bowles, Circuit Judge.

This cause having come on to be heard upon the bill of complaint and answer thereto and proofs taken therein in open Court and the matters in issue having been argued by counsel for the respective parties and the Court being fully advised in the premises, and the Court having filed an Opinion which by reference is made a part hereof, finding that the plaintiff is not entitled to the relief prayed for in its bill of complaint and that Ordinance 167-E is constitutional.

Therefore, Upon motion of the attorneys for defendants,

It Is Ordered, Adjudged and Decreed that the bill of complaint filed in said cause on behalf of plaintiff be dismissed and plaintiff's prayer for permanent injunction be denied, with costs to the defendants to be taxed.

George E. Bowles, Circuit Judge.

O.K. as to form.

Beaumont Smith & Hanir, Attys. for plaintiff.

Countersigned, Edgar M. Branigin, Clerk, Barney Barthoural, Deputy Clerk.

[fol. 41]

IN SUPREME COURT OF STATE OF MICHIGAN

HURON PORTLAND CEMENT COMPANY, a Michigan corporation, Plaintiff and Appellant,

v.

CITY OF DETROIT, a Michigan municipal corporation, BENJAMIN LINSKY, Chief, Bureau of Smoke Abatement, P. J. LAREAU, Defendants and Appellees.

OPINION—Filed January 12, 1959

Before the entire bench.

VOELKER, J.

The defendant city of Detroit has a comprehensive ordinance (No. 167-E) entitled "Smoke Abatement Code" which provides that it shall be unlawful within that city to permit the emission of smoke of a density equal to or greater than that described as No. 2 Ringlemann Chart (a standard accepted way of measuring the density of smoke). This ordinance allows certain temporary exceptions which are not now relevant. It also provides that after an owner has been warned of 3 violations within a 12 month period the commissioner, a city official, shall serve notice on the owners and seal the offending equipment unless he finds that adequate corrective steps have been taken. It also provides for the inspection of equipment and for fines and imprisonment for failure to comply with the ordinance.

On December 20, 1955 the city of Detroit filed complaints in the traffic and ordinance division of the recorder's court [fol. 42] thereof against plaintiff-appellant, owner of the steamships John W. Boardman and S. T. Crapo for allowing the emission of dense smoke at the port of Detroit contrary to the provisions of the ordinance in question.

Appellant then filed suit in circuit court to enjoin the city of Detroit and the other defendants from prosecuting the complaints, and an order was entered granting such an injunction during the pendency of this suit. Thereafter

in circuit court the plaintiff claimed that the ordinance was unconstitutional as to it except in those instances where the objectionable smoke is caused by improper firing or by the improper use of the equipment on the vessel. It is conceded that the vessels operate in interstate commerce. The trial court held that the ordinance was constitutional and that it was a necessary and reasonable exercise of the local police power. From a decree to that effect plaintiff has appealed.

In the exercise of its constitutional power to control interstate commerce the Congress of the United States has provided for extensive control and inspection of American vessels on the Great Lakes. It is the contention of appellant that by such legislation Congress has pre-empted the field and that therefore the ordinance in question is invalid.

The relationship between state and congressional power to control interstate commerce is well stated in 15 CJS, Commerce §11, p. 268 as follows:

> "However, the constitutional grant to congress of power to regulate interstate commerce, although operating of its own force to curtail state power in some measure, does not forestall all state action affecting interstate commerce; it does not withdraw from the states power to legislate in respect of their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce. Although state legislation affects interstate commerce incidentally, indirectly, or remotely, yet where it does not undertake to regulate such commerce and is no more than a bona fide, legitimate, and reasonable exercise of the reserved police power of the state in respect of a matter of local or internal concern, it is valid and * * * will stand, in the absence of conflicting and superseding legislation by congress in the exercise of its superior authority to regulate commerce among the states. * * * "

[fol. 43] Appellant's first question on appeal thus falls naturally into 3 parts: 1: Does the ordinance conflict with any federal legislation? 2: Does it seek to regulate interstate commerce? 3: Is it a reasonable exercise of local police power?

To determine the first part of that question we must look at the scope and intent of the congressional legislation and then examine the ordinance in question to see if it pertains to the same subject matter. The federal legislation cited in appellant's brief, USCA, Title 46, Ch. 14, is, so far as we can determine, intended primarily for the protection and safety of vessels and their passengers, crew and cargo. None of the federal legislation in this field is to our knowledge designed or enacted for the protection of persons and property on land. Appellant has cited none in its brief. (See 1951-52 OAG, p. 370 to the effect that the United States Coast Guard so interprets the applicable federal legislation.) It appears to us that the ordinance and the federal legislation deal with basically different subject matter and are thus not in such conflict that the former must bow.

A quick glance at the title of the ordinance, "Smoke Abatement Code," is sufficient to learn its intent. Even the most casual reading of it indicates clearly that its sole purpose is to protect the health and welfare of the residents of Detroit by preventing the emission of dense smoke into the air which the people must breathe.

Thus paragraphs 2 and 3 of the preamble to the ordinance provide:

> "Whereas, the excessive emission of dense smoke within the corporate limits of the City of Detroit and the resultant effect upon the public health and welfare require the adoption of a comprehensive and integrated plan of smoke control; and
>
> "Whereas, in conjunction with the smoke control program it is desirable to adopt appropriate regulations to reduce air pollution caused by excessive soot, cinders, fly ash, dust, noxious acids, fumes and gases, the emission of which is detrimental to the health and welfare of the residents of the City: Now, Therefore,"

[fol. 44] We think the ordinance before us is clearly aimed at the prevention of air pollution and not at any regulation of interstate commerce. If it affects interstate commerce at all we think it is only indirect and incidental.

Little need be said on the subject of whether or not this ordinance is a reasonable exercise of local police power. We think that by now it is sufficiently clear without citation of authority that excessive air pollution by dense smoke cannot be anything but harmful to the health and welfare of a community. Indeed in 1955 Congress appropriated $5,000,000 a year for 5 years for research into and control of the increasingly vexing problem of air pollution. (We also note that the first national conference on air pollution was held in Washington, D. C. during November, 1958. The National Cancer Institute is presently studying the problem but as of this writing has announced no results. See science section of *Saturday Review* for November 8, 1958.)

We note further that the preamble to the above mentioned congressional appropriation statute says in part:

> "* * * it is declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies and other public or private agencies and institutions in the formulation and execution of their air pollution abatement research programs. * * *" USCA, Title 42, Ch. 15B, §1857.

Regarding this appropriation statute appellant correctly states in its reply brief:

> "* * * In that Act Congress was not attempting to give up its inspection of vessels, locomotives, motor carriers and other things that might conceivably cause or be involved in smoke pollution."

That however is not the question before us. The point is that the ordinance does not seek to supersede or replace any existing provisions of Congress either in the realm of air pollution or for the inspection of vessels, as already [fol. 45] noted. Its purpose is simply to control to some extent the emission of unnecessary smoke in a community

so as to protect the health and welfare of its inhabitants. The portion of the statute quoted above indicates to this Court that the ordinance in question is not only a reasonable exercise of local police power but that such actions by local authorities have the recent blessing and financial encouragement of Congress itself.

On the other hand we reluctantly realize that the pastoral pine-scented days of yore are gone forever, and that our society has become dependent upon vast conglomerates of power of which smoke is all too frequently an unwanted by-product. Thus the elusive question of the reasonableness of such local legislation boils down to one of relativity. An ordinance of this type may be said to be reasonable only if it does not unduly hamper industry and our continual need for power. It does not follow, however, that if we cannot have smokeless cities that men must compose themselves and dwell in an ever-deepening pall of smoke. If this ordinance sought to prevent the emission of all smoke, or if adequate means of smoke control were not available, then a different question might be before us. But this ordinance concededly seeks to outlaw only the emission of smoke of such density that can readily be prevented by the use of modern smoke control equipment. All it costs is money. We find and hold that the ordinance in question is a reasonable exercise of the local police power and as such does not unduly interfere with interstate commerce.

Appellant also argues that whether or not Congress has expressly preempted the field of smoke abatement, the Detroit ordinance unduly burdens interstate and foreign commerce in matters where uniformity is necessary. Appellant bases its arguments on this score primarily on the [fol. 46] fear that local legislation might be inconsistent, that is, that upon meeting Detroit's ordinance it may in the future have to change its equipment again to meet even stricter requirements at some other port. This is a clear possibility we certainly do not deny. We do not see however why *this* ordinance should be held invalid simply because of the possibility that another ordinance might another day be enacted in another place that is even more stringent. Sufficient unto the day is the evil thereof; we will endeavor to cross that smoke-fogged bridge when we come to it. We do not discern it in this case.

As noted, if appellant meets only the minimum requirement of this ordinance it might very well become a burden on it to meet more stringent future requirements as they are enacted. Because of this possibility it would have us strike down the present ordinance. We suggest that such a burden might be avoided if appellant sought to meet the spirit rather than the letter of this present ordinance. This could concededly be done by installing modern equipment and available processes of firing that would reduce smoke to the least possible density. If some future ordinance goes beyond this appellant or someone in its shoes might have a better and a more persuasive basis for a claim of unreasonable burdensomeness.

In an analogous case involving a Georgia statute that required the use of a certain type of headlight on railroad engines, the United States supreme court spoke as follows in answer to arguments strikingly similar to those presented in this case (Atlantic C.L.R. Co. v. Georgia, 234 US 280):

> "In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal action, the use of such agencies, which, unless carefully guarded, was fraught with danger to the community, should go [fol. 47] unregulated, and that the states should be without authority to secure needed local protection. The requirements of a state, of course, must not be arbitrary, or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state, in the exercise of a similar power, may not impose the same regulation. * * *
>
> "If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced,—if there appears to be need of standardization of safety appliances, and of providing rules of operation which

will govern the entire interstate road, irrespective of state boundaries,—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the state, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress, in its control of interstate commerce, to establish such regulations as, in its judgment, may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

We concede that this subject is one that might well call for uniform legislation of federal scope, but until that happens we are not persuaded that our citizens must patriotically gag, choke and grope with obedient resignation until that happy day arrives. Nor are we persuaded that short of any such uniform legislation that local governments are in the meantime powerless to make a proper exercise of their police power.

Appellant cites McMorran v. Cleveland-Cliffs Iron Co., 253 Mich. 65, where this Court reversed that portion of the chancellor's decree below restraining as a nuisance the smoke from the stacks of certain coal-burning lake vessels while tied up at a coaling dock at Port Huron. No smoke ordinance was there involved; the opinion does not indicate that further smoke abatement was there readily available; the plaintiff householders there had moved into the area after these conditions had already long existed; and the smoke from the lake vessels was but a fraction of the general smoke, soot, dust and noise which had long existed, emanating mostly from stationary industrial installations. Our opinion there indicates that the smoke from the vessels was but a reasonable incident of navigation. That case and others cited by appellant are not controlling of our decision here.

[fol. 48] The judgment below is affirmed, but without costs, both a public question and public legislation being involved.

[fol. 49]

IN THE SUPREME COURT OF THE STATE OF MICHIGAN

HURON PORTLAND CEMENT CO.,
Plaintiff and Appellant,

vs. 47364

CITY OF DETROIT, et al., Defendants.

Present: the Honorable John R. Dethmers, Chief Justice, Leland W. Carr, Harry F. Kelly, Talbot Smith, Eugene F. Black, George Edwards, John D. Voelker, Thomas M. Kavanagh, Associate Justices.

DECREE—January 12, 1959

This cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, in Chancery, and having been argued by counsel, and due deliberation had thereon, it is now ordered, adjudged and decreed by the Court, that the decree of the Circuit Court for the County of Wayne, in Chancery be and the same is hereby in all things Affirmed

And it is further ordered, adjudged and decreed that no costs be awarded herein.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 49c] [File endorsement omitted]

[fol. 50] [File endorsement omitted]

[fol. 51]

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
IN CHANCERY
No. 544-318

HURON PORTLAND CEMENT COMPANY, a Michigan corporation, Appellant,

vs.

CITY OF DETROIT, a Michigan municipal corporation, BENJAMIN LINSKY, Chief, Bureau of Smoke Abatement, P. J. LAREAU, Appellees.

CROSS-DESIGNATION BY APPELLEES OF ADDITIONAL MATTERS TO BE INCLUDED IN RECORD—Filed April 17, 1959

To the Clerk of the Court:

You are hereby requested, pursuant to the provisions of Rule 12 of the Rules of the Supreme Court of the United States, to incorporate into the transcript of record on the appeal herein, in addition to the portions of the record designated by appellant herein in its Notice of Appeal, the following:

1. The Preamble to Ordinance No. 167-E of the City of Detroit and also Sections 2.1, 2.2a and 2.2b, and 3.1 of Ordinance No. 167-E of the City of Detroit.

2. This Cross-Designation, together with Proof of Service.

Nathaniel H. Goldstick, Corporation Counsel, John F. Hathaway, Assistant Corporation Counsel, Roger P. O'Connor, Assistant Corporation Counsel, By Roger P. O'Connor, Assistant Corporation Counsel, Attorneys for Appellees, City of Detroit, etc., 1010 City-County Building, Detroit 26, Michigan, WO. 5-4200, Ext. 575.

Dated: April 17, 1959.

[fol. 52] Proof of Service (omitted in printing).

Official

SMOKE ABATEMENT CODE

of the

City of Detroit

Ordinance No. 167-E

As Amended to October 16, 1947

Official

SMOKE ABATEMENT CODE

of the

City of Detroit

Ordinance No. 167-E

As Amended to October 16, 1947

OFFICIAL

SMOKE ABATEMENT CODE

of

Detroit, Michigan

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ORDINANCE NO. 167-E
(Make notation on page 363)

An Ordinance Regulating Smoke and Air Pollution in the City of Detroit

AN ORDINANCE to provide for the control of smoke, the constituent parts thereof, and air pollution within the corporate limits of the City of Detroit; to define the powers and duties of the Department of Buildings and Safety Engineering in connection therewith; to provide for the administration and enforcement thereof; to provide a penalty for the violation of the terms thereof and to repeal all former ordinances and amendments thereto conflicting therewith.

Whereas, the excessive emission of dense smoke within the corporate limits of the City of Detroit and the resultant effect upon the public health and welfare require the adoption of a comprehensive and integrated plan of smoke control; and

Whereas, in conjunction with the smoke control program it is desirable to adopt appropriate regulations to reduce air pollution caused by excessive soot, cinders, fly ash, dust, noxious acids, fumes and gases, the emission of which is detrimental to the health and welfare of the residents of the City: Now, Therefore,

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Article 1 (Definitions)

For the purpose of this Ordinance the following definitions shall apply:

(1.1) **Air Jets.** Any apparatus operated by steam or a motor-driven blower for the purpose of causing turbulent air to be introduced into a furnace and to cause a more complete mixture of oxygen with the gases of combustion immediately above the fuel bed.

(1.2) **Atmospheric Pollution.** The discharging from stacks, chimneys, exhausts, vents, ducts, openings or open bonfires, of any smoke, soot, fly ash, cinders, noxious acids, fumes, oxides, gases, vapors or industrial dusts that cause atmospheric contamination in amounts detrimental to the public health and welfare as defined elsewhere in this Ordinance.

(1.3) **Baffling.** Any row, rows, plane or planes of refractory or other material that causes the gases in a steam boiler or other vessel or device to assume a definite and predetermined path of travel before reaching the chimney or smoke stack.

(1.4) **Board.** Board of Appeals as herein provided.

(1.5) **Breeching.** Any conduit located between the last pass of a boiler, incinerator or other device for the consumption of fuel and the smokestack that conducts smoke, products of combustion and/or gases to the atmosphere or to any intermediate device before being discharged into the atmosphere.

1.6. **Bridgewall.** Any wall at the rear of the grate or stoker that acts as a deflector or radiant heat reflector for the furnace gases and as a stop to the fuel bed or a rear wall of the ash pit.

(1.7) **Bureau.** The Bureau of Smoke Inspection and Abatement of the Department of Buildings & Safety Engineering, as provided for in the City of Detroit Charter under Chapter XVI.

(1.8) **Chimneys and Stacks.** Any conduit, duct, vent, exhaust, or structure or opening of any kind whatsoever capable of and used for the emission of smoke, soot, cinders, noxious acids, gases, fly ash or industrial dusts.

(1.9) **Cinders.** Particles not ordinarily considered as fly ash or dust because of their greater size, entrained in the products of combustion and consisting essentially of fused ash and/or unburned combustibles.

(1.10) **Cleaning Fires.** The act of removing clinkers and/or ash from the fuel bed or furnace.

(1.11) **Combustion Equipment.** Any furnace, incinerator, refuse-burning equipment, fuel-burning equipment, boiler apparatus, device, mechanism, stack or structure used in the process of burning fuel or combustible material.

(1.12) **Commissioner.** Commissioner of the Department of Buildings and Safety Engineering of the City of Detroit, Michigan.

(1.13). **Damper, Automatic or Manual.** Any device placed in the breeching of boilers or incinerators or the smoke pipe of any furnace or other device to regulate the gas pressure or escape of the products of combustion or other gases or air pollutants.

(1.14). **Department.** Department of Buildings and Safety Engineering of the City of Detroit, Michigan.

(1.15) **Dust Collectors, Mechanical Collectors, etc.** Cyclone centrifugal effect collectors, screen cloth (bag type) wet type filters or those using charcoal, spun glass fibers or other material as a filter. Contact, impact baffled, or adhesive collectors. Spray centrifuge type washers, filter towers, electric precipitators. Gravity type dust or settling chambers, etc. Verticose effect collectors, either single or in batteries.

(1.16) **Extension Furnace (Dutch Oven).** Any masonry structure or combination of masonry and metal built on the front of a boiler furnace or other combustion device for the

purpose of obtaining additional furnace volume.

(1.17) **Fire Tubes.** Those tubes through which the hot gases of combustion pass on the way to the breeching to be exhausted into the atmosphere. (Fire tubes are not to be confused with furnace volume.)

(1.18) **Fly Ash.** Gas or air-borne particles larger than one micron (approximately 0.00004 inch) and consisting essentially of fused ash and/or burned or unburned combustible material.

(1.19) **Fuel Dealer.** A retail dealer is one who sells solid fuels in broken bulk, physically handled in other than carlot or cargo vessels, and delivers to the ultimate consumer without regard to price, quantity, or frequency of delivery.

(1.20) **Fumes.** Gases, vapors, metallic oxides that are of such character as to create an unclean, destructive, offensive or unhealthful condition.

(1.21) **Furnace Volume.** Furnace volume is that volume above the fuel bed and in front of the bridge-wall. In case of horizontal fire box boilers, it is that volume measured to the front tube sheet. In the case of vertical tubular boilers, it is that volume measured to the lower tube sheet.

(1.22) **Gases.** Any gas of such character and quantity as to create a hazard to the health and property of the individual or of the public.

(1.23) **Heating Surface.** Any boiler surface having water on one side and hot gases on the other side not excepting any surface covered by the arches or refractory used in the construction of the boiler furnace.

(1.24) **Industrial Dusts. Gas** or air-borne particles larger than one micron emanating from a manufacturing process or material storage or handling.

(1.25) **Kindling Fires.** The act of building up a fuel bed after a new fire has been started. It does not mean replenishing the fire with fresh fuel.

(1.26) **Mechanical Combustion Equipment.** Combustion equipment in which the fresh fuel or combustible material is introduced from outside the furnace into the zone of combustion, the same being actuated by adequate controls; provided, however, that where the Commissioner finds as a fact and so certifies that a stove or other combustion equipment in which the fresh fuel or combustible matter is introduced by hand, is so designed as to automatically burn the fuel or combustible matter smokelessly in a manner not to violate the provisions of this Ordinance, such stove or combustion equipment will be considered as mechanical combustion equipment within the meaning of this Ordinance.

(1.27) **Noxious Acids.** Anhydrous or hydrous acid forms in concentrations high enough to be poisonous or to constitute a nuisance.

(1.28) **Oil Burners.** Any device for the introduction of vaporized or atomized fuel oil into the furnace of any fuel-oil burning furnace or device.

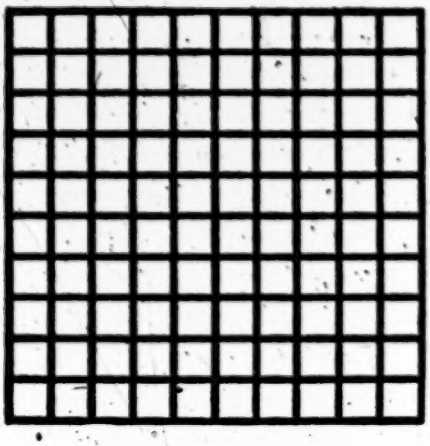
(1.29) **Open Fire.** Any fire wherein the products of combustion are emitted into the atmosphere and are not directed thereto, by or through a smoke stack, chimney or other vent flue or structure.

(1.30) **Person.** Person or persons, firms, corporations, institutions, organizations or associations of any kind or nature. The masculine, feminine, singular or plural is included in any circumstances.

(1.31) **Repair.** Any work which requires the heating or power equipment to be wholly or partially dismantled and which results in the restoration of the heating or power equipment to its original state.

(1.32) **Ringlemann Chart.** The Ringlemann Chart with instructions for use as published by the U. S. Bureau of Mines.

RINGLEMANN CHART



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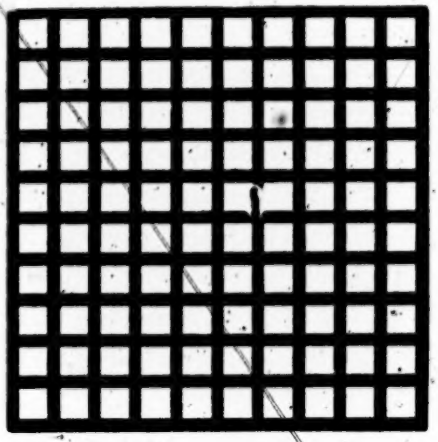

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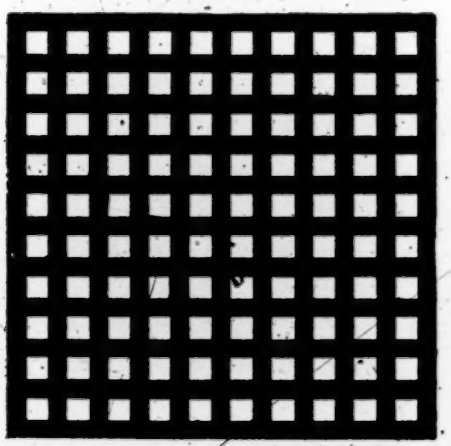

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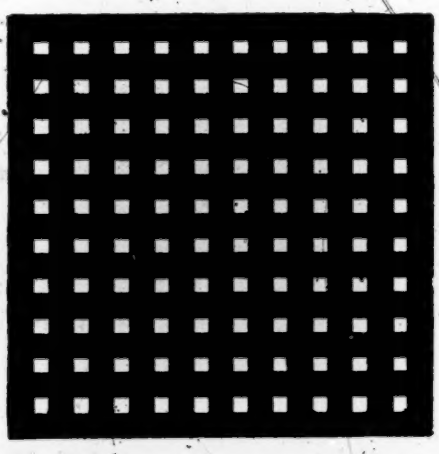

Place the Chart on a line with the stack and far enough away from the left eye so that no white between lines can be seen. Then compare with the smoke under observation.

(1.33) **Smoke.** The visible, finely divided material that escapes from a substance during combustion, except such other materials as are covered by this Ordinance.

(1.34) **Smoke Indicator.** Any device electrically or manually operated, fixed or movable, consisting of photo-electric devices, mirrors or series of mirrors which will allow firemen or other persons operating boilers and/or other fuel burning equipment to determine the density and color of smoke and/or the ingredients of smoke, noxious fumes, acids, oxides or industrial dusts being expelled into the atmosphere.

(1.35) **Smokeless Solid Fuel.** For the purpose of this Ordinance, a solid fuel, the volatile content of which is 23% or less on an ash and moisture-free basis. Except that if a fuel contains volatile matter in excess of 23% on an ash and moisture free basis, it shall be acceptable under the terms of this Ordinance, provided that it meets the same standards with regards to smoke production as that of a fuel containing less than 23% volatile matter on an ash and moisture-free basis and subject to the following conditions in order to ascertain whether or not such standards are met in case of violation: First, com-

plete specifications of the fuel and description of its processing or manufacture must be submitted to the Bureau of Smoke Inspection and Abatement, and from time to time any additional information that may be reasonably required must also be submitted.

Second, an adequate supply of the finished product must be made available to the Bureau of Smoke Inspection and Abatement to conduct whatever tests are deemed necessary to establish its value as a smokeless fuel.

Third, field tests to determine if such fuels can be so fired as to comply with the provisions of this Ordinance may be required.

Fourth, any person whose product is submitted to such tests must pay all expenses necessary to the attendant tests, and the Bureau shall furnish the submittor a copy of the report of the results of such tests.

Fifth, the enforcement of this section with reference to the volatility standard for fuel shall not apply to hand-fired combustion equipment in buildings containing not more than four one-family dwelling units, until October 1, 1949, after which date all the provisions of this section shall apply to such equipment.

(1.36) **Solid Fuel.** Any mined, packaged, or prepared coal, coke, petroleum coke, carbonized coal, either natural or manufactured, synthetic, processed or patented fuel, not sold by liquid or metered measure.

(1.37) **Soot.** Agglomerated particles consisting essentially of carbonaceous material.

(1.38) **Stokers.** Any mechanical or hand-operated device that provides for the controlled burning of solid fuel and the controlled supply of air for combustion.

(1.39) **Surface Burning Type.** Any combustion equipment in which the fresh fuel can be thrown directly on the hot fuel bed.

(1.40) **Umbrascope.** An instrument consisting of an open tube through which observations are made to measure the density of smoke. One end of the tube is closed except for a small opening serving as an eyepiece. At the other end, which is open, there are four semicircular glass light-filters so adapted as to cover a maximum of one-half the field of vision, and so arranged as to allow their use singly or collectively for the purpose of measuring the relative density of smoke against the ambient sky. The results of the observations are then compared with the Ringelmann Chart and the equivalent Ringelmann reading obtained. The method used to obtain equivalent readings is outlined in a report in the Department's files.

(1.41) **Volatile Matter.** The gaseous constituents of solid fuels.

(1.42) **Water Tubes.** Those tubes containing water, around which the gases of combustion pass.

(1.43) **Wing Wall and Combustion Arch.** Any firebrick construction built inside a boiler furnace or other furnace that serves as a deflector of gases in the combustion chamber and as a means of providing radiant heat to aid in the combustion process.

Article 2—Administrative

(2.1) The escape of smoke, soot, cinders, noxious acids, fumes, gases, industrial dust or fly ash as herein prohibited is hereby declared to be a nuisance and may be summarily caused to be abated by the Commissioner or by anyone whom he may duly authorize for such purpose. Such abatement may be in addition to the fines and penalties hereinafter provided

Sec. 2.2A. It shall be unlawful within the City of Detroit for any person, firm or corporation to permit the emission of any smoke from any source whatever of a density equal to or greater than that density described as No. 2 on the Ringlemann Chart; Provided, That the following exceptions to the provisions of this section shall be permitted:

(a) Smoke, the shade or appearance of which is equal to but not darker than No. 2 of the Ringlemann Chart for a period, or periods, aggregating four minutes in any 30 minutes;

(b) Smoke, the shade or appearance of which is equal to but not darker than No. 3 of the Ringlemann Chart for a period, or periods, aggregating three minutes in any 15 minutes, when building a new fire or when breakdown of equipment occurs such as to make it evident that the emission was not reasonably preventable.

2.2B. It shall be unlawful within the City of Detroit for any person, firm or corporation to permit or cause the escape of such quantities of soot, cinders, noxious acids, fumes, gases, fly ash or industrial dust, in such place or manner as to be detrimental to any person or to the public or to endanger the health, comfort and safety of any such person or of the public, or in such manner as to cause or have a tendency to cause injury or damage to property or business.

(2.3) The burning of r u b b i s h, refuse of any kind, leaves, grass, wood, paper and/or garbage in open fires is hereby specifically prohibited, except upon special approval by the Bureau.

(2.4) No person, firm or corporation shall operate or cause to be operated, maintain or cause to be maintained, any process for any pur-

pose, or furnace or combustion device for the burning of coal or other natural or synthetic fuels, without maintaining and operating, while using said process or furnace or combustion device, recognized and approved equipment, means, method, device or contrivance to reduce the quantity of gas or air-borne solids or fumes emitted into the open air, which is operated in conjunction with said process, furnace, or combustion device so that the quantity of gas or air-borne solids shall not exceed 0.30 grains per cubic foot of the carrying medium at a temperature of 500 degrees Fahrenheit.

(a) For the purpose of determining the adequacy of such devices these conditions are to be conformed to when the percentage of excess air in the stack does not exceed 50 per cent at full load. The foregoing requirement shall be measured by the A. S. M. E. Test Code for dust-separating apparatus or by any other generally recognized standard or method of measurement which is acceptable to the Bureau.

(2.5) For the purpose of grading the density of smoke, the Ringelmann Chart, as now published and used by the United States Bureau of Mines, which is hereby made a part of this Ordinance, shall be the standard. However, the Umbrascope readings of smoke densities may be used when correlated with Ringelmann's Chart.

(a) Smoke shall be considered dense when it has a density equal to, or greater than, the density of No. 2 of said chart.

(2.6) It shall be unlawful for any person, firm, corporation, or their agents, to import, sell, offer for sale, expose for sale, exchange, deliver, or transport for use and consumption in the City of Detroit, or to use or consume in the City of Detroit any solid fuel for handfiring or intermittent feeding of surface-burning types of equipment which does not meet the standards of a smokeless solid fuel as set forth in Article 1, Section 1.35, of this Ordinance: Provided, however, That the terms "hand firing or intermittent feeding of surface-burning types of equipment" are hereby specifically declared not to include "down-draft boilers."

Provided, that the importation, delivery or transportation of such fuel by railroad companies and other common carriers, in the course of their common carrier business, shall not be deemed to be a violation of the provisions of this section.

(a) The Commissioner shall, upon request, furnish a list of brands or trade names of smokeless solid fuels, which have been tested for conformity with the provisions of this Ordinance and which as a result of such tests have been approved.

(2.7) Solid fuel not meeting the requirements of this ordinance for a smokeless solid fuel may be used or consumed only in approved mechanical combustion equipment or devices as provided in this Ordinance: Provided, That

(a) After suitable inspections and tests, have proven to the Bureau that any combination of combustion equipment or devices and fuel satisfactorily comply with the provisions of this Ordinance, the Commissioner shall approve the use of such combination of combustion equipment or devices and fuel.

(2.8) It shall be the duty of all persons purchasing combustion equipment, except repair parts and minor accessories, which is required to be connected to a vent or stack, to report to the Bureau the purchase of every such article to be installed or used anywhere within the corporate limits of the City of Detroit. The report herein provided for shall be in writing and be delivered or mailed to the Bureau within seven days after such purchase and shall contain the name and address of the purchaser and the location of the building in which each article is to be installed or used.

(a) Any person violating any of the provisions of this requirement, or making any false statement or report in connection with the purchase of any such articles mentioned in this section shall be subject to the fines and penalties hereinafter provided.

(b) This requirement shall not apply to wholesale transactions made for the purpose of resale.

(2.9) No person, firm, corporation, nor the agent or agents of such person, firm, or corportaion shall purchase or contract to purchase for use or consumption within the City of Detroit any fuel without first informing the fuel dealer as to the type of combustion equipment or device in which the fuel is to be used and the type of fuel specified for use in such combustion equipment or device under the provisions of this Ordinance.

(a) The fuel dealer's records shall indicate, among other things, the type of combustion equipment or devices and the type of fuel specified by the purchaser and supplied by the fuel dealer.

(b) No fuel dealer shall supply fuel to a purchaser that is not approved for use in the purchaser's combustion equipment or devices as herein provided.

2.10. Except in buildings used exclusively for residential purposes containing less than three dwelling units or flats, no new fuel-burning plants nor reconstruction, repair or addition to any existing fuel-burning plants for producing power and heat, or either of them, nor refuse-burning equipment, nor any stack or furnace connected with such fuel or refuse-burning equipment, shall be installed, erected, reconstructed, repaired or added to, nor operated in the City of Detroit until plans and specifications of the same have been filed by the owner, contractor, installer or other responsible person, in the offices of and approved by the Department as being so designed that same can be managed and operated to conform with the provisions of this Ordinance, and a permit issued for such installation, erection, reconstruction, addition to, or repair and operation, as hereinafter provided.

(a) Repairs to previously approved fuel or refuse-burning plants may be made without first securing a permit, provided the owner, contractor, installer or other person making or causing such repairs, shall report the same to the Bureau within three days after commencing such repairs, and shall conform to all of the provisions of this Ordinance in making such repairs.

(b) Nothing in this requirement shall be construed as to prohibit the making of emergency repairs to any stack, furnace or device when the necessity for such repair arises outside of the business hours of the Bureau; provided the owner, contractor, installer or other person permitting or making such repairs shall report the same to the Bureau on the the first business day after such emergency repairs are commenced and apply for a permit therefor.

(2.11) Plans and specifications so filed with the Department shall show the type of installation, the amount of work and the amount of heating to be done by such fuel or refuse-burning plant and all appurtenances thereto, including all provisions made for the purpose of securing complete combustion of the fuel or refuse to be used and the manner in which it is to be burned for the purpose of preventing smoke and other air pollution as provided by this Ordinance.

(a) Said plans and specifications shall also contain a statement of the rate of burning and kind of fuel or refuse proposed to be used and the manner in which it is to be burned.

(b) Such plans shall further show the dimensions of the room in which such fuel or refuse-burning equipment is to be located, the location and dimensions of all stacks used in connection with or as a part of said fuel or refuse-burning plant.

(c) The Bureau may require such additional data as is deemed necessary for the purpose of issuing a permit for the operation of such fuel-burning devices.

(2.12) Upon the inspection and approval of said plans and specifications by the Department and upon the payment of the fees hereinafter provided, and if such plans and specifications shall show that adequate and approved provisions for securing complete combustion of the fuel or refuse to be used and for preventing or eliminating smoke, soot, cinders, fly ash, noxious acids, fumes, gases or industrial dust have been made, a permit for the installation or for the construction, erection, reconstruction, repair, or addition to and operation of such fuel or refuse-burning plant shall be issued.

(a) As soon as the permit has been issued as above provided, it shall be the duty of the various other bureaus of the Department, having charge of the inspection of the premises wherein said fuel or refuse-burning equipment is located to cooperate with the said Bureau of Smoke Inspection and Abatement to see that the execution of the work so authorized by said permit shall be done in conformity with the approved plans and specifications, and the standards, rules and regulations fixed by the Department.

(2.13) If such plans and specifications as described above are not submitted to the Bureau for approval previous to the installation of any new fuel-burning plant, addition to or repair or reconstruction of any fuel-burning plant for producing power, heat, or either of them, or refuse-burning plant, or any stack connected with such fuel or refuse-burning plant, the Bureau is authorized to seal immediately such equipment until the owner, contractor, installer or other person has complied with these provisions.

(2.14) It shall be unlawful for any person to use any new, reconstructed or repaired plant or addition thereto, or any plant duly sealed under the provisions of this Ordinance, for the production and generation of heat and power, or either of them, or for the burning of refuse, until he shall have first procured a certificate from the Bureau certifying that the plant is so constructed that it will do the work required with the type of fuel and equipment used; and that, in the opinion of the head of the Bureau, it can consistently be operated in compliance with the terms of this

Ordinance, when burning the type of fuel in the manner specified in the permit, and until a notice of the size, type, kind of fuel and the manner of burning the fuel as specified in the permit has been prominently displayed and permanently attached to said plant.

(2.15) The issuance and delivery by the Bureau of any permit or certificate for the construction, reconstruction, alteration, repair, or addition thereto, of any plant or stack connected with a plant or for the operation of such plant or stack shall not be held to exempt any person, firm or corporation to whom any such permit or certificate has been issued and delivered, or who is in possession of any such permit or certificate, from prosecution on account of the emission of dense smoke, fly ash, soot, cinders, noxious acids, fumes, gases, or industrial dusts caused or permitted by any such person.

(2.16) It shall be unlawful for any person, firm or corporation to use or operate any furnace or other combustion equipment or device which is subject to annual inspection, as hereinafter set forth, without a certificate of operation; provided, however, that if application for such certificate of operation has been made and the required inspection fee paid, it shall be lawful to use such furnace or other fuel-burning equipment or device until receipt of such certificate or until notification by the Bureau of its refusal to grant such certificate.

(2.17) Every furnace or other combustion equipment or device shall be inspected annually and a report and permanent record made of such inspection by the Bureau except the following:

(1) Furnaces or other combustion equipment or devices installed to heat buildings used exclusively for private residences containing less than three dwelling units or flats, and

(2) Combustion equipment or devices used exclusively for private residences which do not contain a central heating plant.

(2.18) The Department shall not issue a building permit for the erection, construction, reconstruction or alteration of any building or structure where the plans for such building or structure show any stack in connection with such building or structure until such plans have been submitted to the Bureau and the dimensions of such stack approved as having sufficient capacity and as being suitable for the type of equipment and fuel to be used.

(2.19) The Department shall not approve plans or issue permits for the installation of any fuel-burning equipment or device of the surface-burning type unless the fuel to be used in such device shall be a smokeless solid fuel, as defined in Article 1 Section 1.35 of this Ordinance, or a mechanical fuel-burning device is to be used of a type which will so operate as not to emit dense smoke, or permit the escape of soot, cinders, noxious acids, fumes, gases, fly ash, or industrial dusts or otherwise pollute the air in violation of the provisions of this Ordinance.

(2.20) After any owner, agent, occupant, manager or lessee of any premises has been previously notified of three or more violations of this Ordinance within any consecutive 12-month period, in respect to the emission of smoke, soot, cinders, noxious acids, fumes, gases, fly ash or industrial dusts, the owner, agent, occupant, manager or lessee of said premises shall be notified to show cause before the Commissioner not less than ten days from the date of notice, why the equipment causing such violations should not be sealed.

(a) The notice herein provided for may be given by mail directed to the last known address of the party to be notified, or if said party or his whereabouts is unknown, then by posting a notice on or near the premises at which the violations shall have occurred. Upon said date said violator may appear and be heard. Upon such hearing, if the Commissioner finds that adequate corrective means and methods have not been employed to correct the cause of such condition then it shall be his duty to seal said equipment until such time as a permit and certificate as herein provided have been applied for and issued for said plant.

(b) It shall be unlawful for any person to break a seal of any refuse burning equipment, any boiler or any equipment or device producing heat or power, that has been duly sealed by the Commissioner or his authorized representative.

(2.21) When a certificate of operation is refused in the case of an original inspection or a case of an annual inspection, the Commissioner is authorized to seal, immediately, the furnace or other combustion equipment until the owner, lessee or other person required to procure the certificate of operation shall have complied with the provisions of this Ordinance.

(2.22) Where the Department finds it necessary for compliance with the applicable provisions of this Ordinance, no solid fuel burning railroad locomotive or other power equipment shall be used within the corporate limits of the City of Detroit, unless such locomotives shall be equipped with proper combustion devices or other suitable equipment.

(2.23) Where the Department finds

it necessary for compliance with the applicable provisions of this Ordinance all engine houses in which steam locomotives are repaired, serviced, cleaned, and/or housed shall be equipped with a "direct steaming" or "fuelless" system or a collector and gas washing system to prevent the visible products of combustion either from solid or liquid fuel from being expelled into the atmosphere.

(2.24) Failure on the part of any person, railroad company, corporation, association or their agents to provide the necessary means, equipment, and/or device to prevent the emission of smoke and cinders as prohibited by this Ordinance, or failure to instruct the operating crews, enginemen, firemen, hostlers or others about proper operation of said traction equipment, shall be deemed a violation of this Ordinance and shall be subject to the penalties as hereinafter provided.

(2.25) Failure of the operating crews, enginemen, firemen, hostlers or others to comply with the provisions of this Ordinance shall be deemed a violation of this Ordinance and shall be subject to the penalties as hereinafter provided.

(2.26) Railroad locomotives are hereby exempted from the provisions of the following sections of this Ordinance, 2.4, 2.8, 2.9, 2.10, 2.11, 2.12, 2.13, 2.14, 2.17, and 2.21; and furthermore, line locomotives are exempted from the provisions of Sections 2.6 and 2.7.

Sec. 2.27. Where a violator of the provisions of this Ordinance with respect to the emission of smoke, soot, cinders, noxious acids, fumes, gases, fly ash or industrial dusts produces evidence satisfactory to the Commissioner that he has taken all steps necessary to provide for future compliance with the provisions of the Ordinance but that the acquisition of the proper device or equipment cannot be effected immediately, the Commissioner shall have the authority to allow a period not exceeding six months from the effective date of the applicable provision or provisions of this Ordinance, within which the necessary device or equipment is to be acquired and installed: Provided, That a written report thereon is filed by the Commissioner with the Common Council and that body, by resolution, approves such action. During any said granted period the violator of the Ordinance shall not be subject to the fines or penalties herein provided; if, however, such violator fails in the time allowed to conform with the provisions of this Ordinance such shall be subject to all the fines and penalties herein provided dating from the date of the beginning of the said period.

(2.28) Any person aggrieved by any decision, ruling, or order of the Commissioner may take an appeal to the Board of Appeals of the Department of Buildings and Safety Engineering. Such appeal shall be taken within ten days after the decision, ruling or order complained of by filing with the Commissioner a notice of appeal directed to the Appeal Board, specifying the grounds thereof and the relief prayed for. The Commissioner shall forthwith transmit to the Appeal Board all papers constituting the record upon which the decision, ruling or order appealed from is taken. The Board shall fix a reasonable time for the hearing of the appeal and give due notice thereof by mail to the parties in interest and decide the question within a reasonable time.

(a) Such appeal shall act as a stay of any decision, ruling or order until either approved, modified or set aside by said Appeal Board. At the hearing any party may appear in person or by agent or by attorney.

(b) A fee as hereinafter specified shall be deposited with the Bureau at the time the appeal is filed, and if paid by check or money order, it shall be made payable to the Treasurer of the City of Detroit.

(c) The Board, upon hearing such appeal, shall either affirm, modify or set aside any such decision, ruling or order. The Board shall refund the fee if a decision is rendered in favor of the appellant.

(2.29) For the purpose of aiding the Commissioner in establishing Rules and Regulations and in reaching proper and just decisions on all matters pertaining to the enforcement of the provisions of this Ordinance, an Advisory Board, to be appointed by the Mayor, is hereby established.

(a) Said Board shall consist of five members, three of whom shall constitute a quorum, and all of whom will serve without compensation. One member of the Board shall be a duly registered doctor of medicine whose status as such has been unchanged for a period of at least five years previous to his appointment; one member shall be a combustion engineer whose status as such has been unchanged for a period not less than five years previous to his appointment; one member shall be an accredited coal dealer whose status as such has been unchanged for a period not less than five years previous to his appointment; one member shall be a bona fide representative of a railroad whose status as such has been unchanged for a period not less than five years previous to his appointment; there shall be one woman member whose experience has been such as to qualify her for such appointment; one member of

the Board will be designated as Chairman by the Mayor.

(b) It shall be the duty of said Board to advise the Commissioner on all rules and regulations of the Bureau; and on technical points concerned with the enforcement of the provisions of this Ordinance; but the Commissioner shall not be required to act on the advice of the Board if, in his opinion, there is good and sufficient reason to believe that such advice will not serve the best interests of the public.

(c) Meetings of the Board shall be at such times as deemed necessary by the Chairman or by the Commissioner.

(2.30). Fees for the issuance of all permits and certificates and for hearings before the Board of Appeals and inspections required under the provisions of this Ordinance shall be collected by the Bureau of Licenses and Permits of the Department. The amount of such fees shall be established by the Board of Rules of the Department and shall cover the cost of inspection and supervision resulting from the enforcement of this Ordinance, but in no case shall the installation permit fee or the hearing fee be less than two dollars ($2.00) or more than twenty ($20.00); nor the inspection fee or certificate fee less than three dollars ($3.00) or more than fifteen dollars ($15.00).

(a) The fee for the original inspection shall include the issuance of a certificate for operation in case such certificate is granted and shall be paid at the time the permit is secured.

(b) No charge shall be made for permits and/or original inspections relating to combustion equipment or devices to be installed to heat buildings used exclusively for private residences that do not contain a central heating plant.

Article 3—(Penalties, Severability, Etc.)

(3.1) If any clause sentence, paragraph or part of this Ordinance, or the application thereof to any person, firm, corporation or circumstances, shall for any reason be adjudged by a Court of competent jurisdiction to be unconstitutional or invalid, said judgment shall not affect, impair or invalidate the remainder of this Ordinance and the application of such provision to other persons, firms, corporations or circumstances, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person, firm, corporation or circumstances involved. It is hereby declared to be the legislative intent of this body that this Ordinance would have been adopted had such invalid provisions not been included.

(3.2) Any person, persons, firm, partnership, association or corporation or any one acting in behalf of said person, persons, firm, partnership, association or corporation violating any of the provisions of this Ordinance shall upon conviction thereof be subject to a fine of not more than one hundred dollars ($100.00) or to imprisonment in the Detroit House of Correction for a period of not more than thirty (30) days, or to both such fine and imprisonment in the discretion of the court. Each day that a violation of this Ordinance is continued or permitted to exist without compliance shall constitute a separate offense punishable upon conviction in the manner prescribed in this section.

(3.3) Any person or persons who shall refuse to comply with or who shall assist in the violation of any of the provisions of this Ordinance, or who, in any manner, hinders, obstructs, delays, resists, prevents, or in any way interferes with the Inspectional Personnel of the Bureau, or police officers in the performance of any duty herein enjoined, or shall refuse to permit such inspectors or officers to perform their duty by refusing them, or either of them entrance at reasonable hours to any premises in which the provisions of this Ordinance are being violated, or refuse to permit the inspection or examination of such building, establishment, premises or enclosures for the purpose of the enforcement of this Ordinance, shall be subject to the fines and penalties herein provided.

(3.4) Any prosecution arising from a violation of any Ordinance repealed herein, which prosecution may be pending at the time this Ordinance becomes effective, or any prosecution which may be started within one (1) year after the date of effect of this Ordinance in consequence of any violation of any Ordinance repealed herein which violation was committed previous to the date of effect of this Ordinance, shall be tried and determined exactly as if such Ordinance had not been repealed.

(3.5) All previous Ordinances, or portions of Ordinances, inconsistent with or in conflict with this Ordinance and all amendments thereto are hereby repealed.

(3.6) The Commissioner of the Department of Buildings and Safety Engineering is hereby empowered to prepare and, with the approval of the Common Council, promulgate from

time to time, rules and regulations and setting standards for stokers and other fuel-burning equipment and devices for preventing the pollution of the atmosphere and any other special requirements that may arise in conjunction with the burning of fuel or pollution of the air.

(a) Any other rulings or regulations that may be found necessary from time to time may, with the approval of the Common Council, be added or incorporated in the existing rules after being published.

(3.7) If at any time the Common Council by resolution determines that because of a scarcity of fuel there exists a public emergency involving the peace, health or safety of the people of the City of Detroit, it may also by resolution suspend the operation of any or all of the provisions of this ordinance for periods not exceeding 120 days for each such emergency.

ARTICLE 4

Work Code

(4.1) Chimneys shall be of such height as to produce sufficient available draft to supply a proper amount of air to burn smokelessly the maximum amount of fuel that is to be consumed and to overcome draft loss or restrictions in furnace, boiler setting, gas passages, damper openings, breechings, and stacks. The chimney must be of sufficient cross-sectional area to allow the free un-restricted discharge of the products of combustion.

(a) For high pressure boilers the height and dimensions of the chimney shall be figured in accordance with any acceptable formula, but, in no case shall such height and dimensions be less than that specified in Table No. 1 without specific approval of the Bureau.

(Table No. 5—Sizes of Chimneys for Steam Boilers Kent's Mechanical Engineering Handbook 11th Edition, 1945, Page 6-107.)

(b) For low pressure heating boilers the height and dimensions of the stack may be figured in accordance with any acceptable formula, but in no case shall the height and dimensions be less than that specified in Table 2 without specific approval of the Bureau.

TABLE NO. 2

Chimney Flue Dimensions

(c) No smoke stack or chimney, irrespective of the above (Sec. 4.1(a)

BOILER RATINGS SQUARE FEET		CHIMNEY FLUE SIZES		CHIMNEY HEIGHT—FT.
Steam	Water	Round	Square	Minimum
300 to 600	300 to 1,000	8"	8"x 8"	25' to 35'
700 to 1,200	1,200 to 1,800	10"	8"x12"	35' to 40'
1,300 to 1,800	2,000 to 2,800	12"	12"x12"	40' to 45'
2,000 to 2,500	3,000 to 4,000	15"	12"x16"	40' to 45'
3,000 to 3,500	4,800 to 5,600	16"	16"x16"	45' to 50'
4,000 to 4,500	6,400 to 7,200	18"	16"x20"	45' to 50'
4,500 to 5,000	7,200 to 8,000	20"	16"x20"	50' to 55'
5,000 to 5,500	8,000 to 8,800	20"	20"x20"	50' to 55'
5,500 to 6,000	8,800 to 9,600	20"	20"x20"	55' to 60'
6,000 to 6,500	9,600 to 10,000	22"	20"x20"	55' to 60'
6,500 to 7,000	10,400 to 12,000	24"	20"x24"	60' to 65'
7,000 to 8,000	12,000 to 12,800	24"	20"x24"	65' to 70'
8,000 to 9,000	12,800 to 14,400	26"	24"x24"	70' to 75'
9,000 to 10,250	14,400 to 16,800	28"	24"x28"	75 to 80'
10,250 to 12,750	16,800 to 20,400	28"	24"x28"	80 to 85'
12,750 to 15,600	20,400 to 25,000	30"	24"x28"	85' to 90'
15,600 to 18,000	25,000 to 28,800	32"	28"x28"	90' to 100'
18,000 to 20,400	28,800 to 32,640	32"	30"x30"	100' to 110'

(From the Association of Radiator Mfrs. Lab., Geneva, N. Y.)

and (b), shall be installed with less cross-sectional area or with less than those recommended by the manufacturers of the boiler or boilers connected thereto.

(d) No smoke stack or chimney shall have openings other than for the breeching or breechings for the boiler, boilers or combustion equipment served and a clean-out door.

(e) All incinerator stacks and any other chimney, smoke stack or flue which emits sparks in sufficient amount or size to cause a hazard to buildings or surrounding property shall be equipped with a spark arrester of proper size and construction to prevent the emission of such dangerous sparks.

(f) All stacks and chimneys and parts thereof or appurtenances thereto shall be constructed in accordance with the provisions of Article 22 of the Official Building Code of the City of Detroit.

(g) The Department may grant

Table No. 1—Sizes of Chimneys for Steam Boilers*
Based on Kent Chimney Formula (11)

Diam., in.	Area A, sq. ft.	Effective Area, E. A-O.6VA sq. ft.	Height of Chimney, ft. 40	50	60	70	80	90	100	110	125	150	175	200	225	250	275	300	325	350	375	400	Equivalent Square Chimneys, Side of Square in. (12 VE) -4
			Commercial Horsepower of Boiler																				
18	1.77	0.97	21	23	25	27	29	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	16
21	2.41	1.47	31	35	38	41	44	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	19
24	3.14	2.08	44	49	54	58	62	66	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	22
27	3.98	2.78	59	65	72	78	83	88	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	24
30	4.91	3.58	....	84	92	100	107	113	119	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	27
33	5.94	4.48	....	....	115	125	133	141	149	156	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	30
36	7.07	5.47	....	....	141	152	163	173	182	191	204	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	32
39	8.30	6.57	....	....	.....	183	196	208	219	229	245	268	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	35
42	9.62	7.76	....	....	.....	216	231	245	258	271	289	316	342	.....	.....	.....	.....	.....	.....	.....	.....	.....	38
48	12.57	10.44	....	....	.....	.....	311	330	348	365	389	426	460	492	.....	.....	.....	.....	.....	.....	.....	.....	43
54	15.90	13.51	....	....	.....	.....	.....	427	449	472	503	551	595	636	675	.....	.....	.....	.....	.....	.....	.....	48
60	19.64	16.98	....	....	.....	.....	.....	536	565	593	632	692	748	800	848	894	938	.....	.....	.....	.....	.....	54
66	23.76	20.83	....	....	.....	.....	.....	.....	694	728	776	849	918	981	1040	1097	1150	1201	.....	.....	.....	.....	59
72	28.27	25.08	....	....	.....	.....	.....	.....	835	876	934	1023	1105	1181	1253	1320	1385	1447	1506	.....	.....	.....	64
78	33.18	29.73	....	....	.....	.....	.....	.....	.....	1038	1107	1212	1310	1400	1485	1565	1642	1715	1785	1852	.....	.....	70
84	38.48	34.76	....	....	.....	.....	.....	.....	.....	1214	1294	1418	1531	1637	1736	1830	1920	2005	2087	2166	2241	.....	75
90	44.18	40.19	....	....	.....	.....	.....	.....	.....	.....	1496	1639	1770	1893	2008	2116	2219	2318	2413	2504	2592	2677	80
96	50.27	46.01	....	....	.....	.....	.....	.....	.....	.....	1712	1876	2027	2167	2298	2423	2541	2654	2762	2866	2967	3064	86
102	56.75	52.23	....	....	.....	.....	.....	.....	.....	.....	1944	2130	2300	2459	2609	2750	2884	3012	3136	3254	3368	3479	91
108	63.62	58.83	....	....	.....	.....	.....	.....	.....	.....	2090	2399	2592	2771	2939	3098	3249	3393	3532	3665	3794	3918	96
114	70.88	65.83	....	....	.....	.....	.....	.....	.....	.....	.....	2685	2900	3100	3288	3466	3635	3797	3952	4101	4245	4384	101
120	78.54	73.22	....	....	.....	.....	.....	.....	.....	.....	.....	2986	3226	3448	2657	3855	4043	4223	4396	4562	4722	4876	107
132	95.03	89.18	....	....	.....	.....	.....	.....	.....	.....	.....	3637	3929	4200	4455	4696	4925	5144	5354	5556	5751	5939	117
144	113.10	106.72	....	....	.....	.....	.....	.....	.....	.....	.....	4352	4701	5026	5331	5618	5893	6155	6407	6649	6882	7108	128
156	132.73	125.82	....	....	.....	.....	.....	.....	.....	.....	.....	.....	5542	5925	6285	6624	6948	7264	7553	7838	8114	8380	138
168	153.94	146.51	....	....	.....	.....	.....	.....	.....	.....	.....	.....	6454	6899	7318	7713	8091	8459	8795	9127	9448	9758	150
180	176.71	168.76	....	....	.....	.....	.....	.....	.....	.....	.....	.....	7434	7947	8430	8886	9318	9734	10131	10514	10883	11240	160
192	201.06	192.55	....	....	.....	.....	.....	.....	.....	.....	.....	.....	8482	9068	9618	10138	10633	11106	11559	11996	12417	12824	172
204	226.98	217.94	....	....	.....	.....	.....	.....	.....	.....	.....	.....	.....	10263	10886	11475	12035	12570	13083	135[illegible]	14054	14515	181
216	254.47	244.90	....	....	.....	.....	.....	.....	.....	.....	.....	.....	.....	11533	12233	12894	13524	14125	14702	1525[illegible]	15792	16310	192
228	283.53	273.43	....	....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	13658	14397	15099	15771	16414	17034	17632	18210	202
240	314.16	303.53	....	....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	15161	15981	16761	17507	18222	18909	19573	20215	213

*Calculated on basis of 1 Boiler Horsepower equal 5 lb. of coal burned per hour. For any other rate of combustion multiply the value in the table by the ratio of 5 to the actual rate of combustion.

permission for the construction and use of stacks or chimneys for use with combustion equipment or devices using gaseous or liquid fuels or a combination of such fuels without strict compliance with Paragraphs (a) and (b) of this section (4.1); provided, (1) such stacks or chimneys cannot immediately or at any time be used with solid fuel burning equipment in such manner as to violate the provisions of this Ordinance, and that (2) such stacks or chimneys shall otherwise comply with the provisions of this Ordinance.

(4.2) Where the Department finds it necessary for compliance with applicable provisions of this Ordinance, all incinerators shall be equipped with gas washing devices, settling chambers, or other approved devices for the elimination of the nuisance.

(4.3) Breechings of all boilers or fuel-burning devices shall be of sufficient cross-sectional area as to prevent excessive gas velocity and to defeat the obtaining of complete combustion; and shall have a minimum number of bends and turns.

(4.4) Induced draft fans may be used where necessary or desirable, provided the requirements concerning stack or chimney size and height are observed in accordance with the provisions herein specified.

(a) Cases involving the use of Venturi stacks and other stacks or chimneys not deemed to be within the coverage of this Code shall be decided upon their merits and the Commissioner may grant approval for the use of such stacks or chimneys.

(4.5) Tube areas and gas passages through heating surfaces shall be of sufficient area to permit of the ordinary accumulation of soot and fly ash without such restriction to draft as would interfere with smokeless operation of the fuel-burning equipment. Sufficient means must be provided for the removal of soot, fly ash, dust, and cinders from the heating surfaces, tube region, and gas passages. Baffles must be of such design and so installed and maintained as to not interfere with smokeless combustion due to the impigning of flame on heating surfaces where such impingement would result in reduction of temperature below the ignition point of the combustible gas.

(4.6) Furnace Volume requirements for coal, fuel oil, pulverized coal, wood-refuse, horizontal boilers shall be as follows:

(a) A steam boiler furnace or other furnace using hand-method of firing shall be provided with a furnace volume of not less than 1 cu. ft. combustion volume for each rated horsepower or for each 140 sq. ft. equivalent direct radiation capacity.

(b) Mechanical stokers shall be provided with a furnace volume of not less than 1 cu. ft. per rated horsepower.

(c) Furnaces using fuel oil shall be provided with a furnace volume of not less than 1.50 cu. ft. per rated horsepower or for each 140 sq. ft. equivalent direct radiation.

(d) Furnaces using pulverized coal shall have not less than 3 cu. ft. furnace volume per rated horsepower.

(e) Wood-refuse burning boilers or furnaces shall maintain a furnace volume of from 6 to 10 cu. ft. per rated horsepower.

(f) Refuse-burners and destructor type of incinerators shall maintain a furnace volume of 1 cu. ft. per sq. ft. grate surface.

(4.7) Horizontal return tubular boilers not equipped with mechanical stokers shall be so set as to provide adequate combustion facilities, and in no case shall the distance from shell

TABLE 4

Setting Heights for Stoker Equipped Boilers

Min.—Absolute minimum **P.M.—Preferred minimum**

Type of Boiler	TYPE OF STOKER: Multiple Retort Underfeed		Single Retort Underfeed		Side Overfeed		Front Overfeed		Chain Grates	
	Min.	P.M.	Min.	P.M.	Min.	P.M.	Min.	P.M.	Min.	P.M.
Water Tube:										
Horizontal	10'	12'	10'	12'	8'	10'	8'	11'	8'	10'
Inclined (Hor. M. D.)	7'	8'	6'	8'	6'	8'	5'	7'	6'	8'
Inclined (Vert. M. D.)	5'	8'	5'	6'	3'6"	5'	3'6"	5'	3'6"	5'
Vertical (Hor. M. D.)	3'	4'	3'	4'	3'	4'	3'	4'	3'	4'
Vertical (Vert. M. D.)										
150 h. p.	4'6"	6'	4'6"	5'	4'6"	5'	3'3"	....	3'6"	4'6"
250 h. p.	5'6"	6'	5'6"	6'	5'6"	6'	3'3"	....	3'6"	4'6"
500 h. p.	6'	6'6"	6'	6'6"	6'	6'6"	3'3"	....	3'6"	4'6"
Horizontal Ret. Tubular:										
72 in.	8'	10'	8'	10'	7'	10'	7'	8'	6'	8'
84 in.	8'	10'	8'	10'	7'	10'	7'	8'	6'	8'

Type of Boiler	Chain Grates	
	Min.	P.M.
Water Tube:		
Horizontal	12'	14'
Inclined (Hor. M. D.)	8'	8'
Inclined (Vert. M. D.)	6'	8'
Vertical (Hor. M. D.)	3'	4'
Vertical (Vert. M. D.)		
150 h. p.	5'	5'6"
250 h. p.	5'	5'6"
500 h. p.	6'	6'6"
Horizontal Ret. Tubular:		
72 in.	8'	10'
84 in.	8'	10'

to grate be less than specified in Table 3.

TABLE 3

Boiler Diameter	Distance Shell to grate
84"	72"
78"	72"
72"	60"
66"	60"
60"	54"
54"	48"
48"	48"
36"	36"

(4.8) Power boilers equipped with stokers shall be set in accordance with the minimum dimensions found in Table 4.

(4.9) Forced draft fans may be used provided suitable arrangements are made for the prevention of the emission of soot, cinders, and fly ash.

(4.10) Use and Installation of Air Jets. All high pressure boilers using solid fuel and not equipped with mechanical stokers or provisions for using pulverized fuel shall have at least one air jet for each 200 sq. ft. H. S. or fraction thereof. In no case shall there be less than two air jets. The jets shall be installed at or under the direction of an inspector of the Bureau of Smoke Inspection and Abatement of the Department of Buildings and Safety Engineering.

(a) Where it is impossible, due to construction, to equip a boiler and furnace with air jets, it will be necessary to install mechanical stokers on all boilers having more than 200 sq. ft. H. S. or 2,500 sq. ft. equivalent direct radiation.

(4.11) Every owner, agent, or lessee of every boiler plant within the corporate limits of the City of Detroit, except those using gas fuel and/or electricity and excepting coal-burning boilers of 20 horsepower or 2,500 sq. ft. of equivalent direct radiation or less, shall provide means whereby the fireman or engineer or the person firing the boiler may be enabled to know without leaving the boiler or furnace room whether or not dense smoke is being emitted from the chimney or stack, so that the necessary correction may be made at the time. Such means of observation shall consist of one of the following:

(a) A window or other opening through which unobstructed view of the top of the stack may be had from the boiler or furnace room.

(b) A mirror or series of mirrors so placed as to reflect the top of the stack and be visible from the boiler or furnace room.

(c) A smoke indicator as approved by the Bureau of Smoke Inspection and Abatement of the Department of Buildings and Safety Engineering.

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Approved July 15, 1947.
Published July 16, 17, 18, 1947.
Effective August 14, 1947.

Sec. 2.6 amended by Ordinance No. 194E.

(J.C.C. September 16, 1947.)
Passed September 16, 1947.
Approved September 17, 1947.
Published September 18, 19, 20, 1947.
Effective October 17, 1947.

Amended by adding Sec. 3.7, Ordinance No. 205E.

(J.C.C. 2562, Sept. 23, 1947.)
Passed Oct. 7, 1947.
Approved Oct. 14, 1947.
Published Oct. 15, 16, 17, 1947.
Effective Oct., 16, 1947.

THOMAS D. LEADBETTER,
City Clerk.

(Complete through Oct. 16, 1947

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ENDORSEMENTS OF CHANGE OF MASTER

t of Alpena, Mich May 7, 19 55

James M Burke, having taken the oath
uired by law, is at present master of the within-named vessel.

[illegible] Deputy Collector of Customs.

t of [illegible] 19

[illegible] having taken the oath
quired by law, is at present master of the within-named vessel.

[illegible] Deputy Collector of Customs.

rt of Alpena Mich 5/20, 19 55

James M Burke, having taken the oath
quired by law, is at present master of the within-named vessel.

[illegible] Deputy Collector of Customs.

rt of [illegible] 19

[illegible], having taken the oath
quired by law, is at present master of the within-named vessel.

[illegible] Deputy Collector of Customs.

rt of [illegible] 8/18, 19 55

[illegible], having taken the oath
quired by law, is at present master of the within-named vessel.

[illegible] Deputy Collector of Customs.

rt of Detroit Michigan, March 20, 1957

Angus Bain Mac Queen, having taken the oath
quired by law, is at present master of the within-named vessel.

O.O. Goodwin
Deputy Collector of Customs.

(7)
Port of Alpena Mich 6/25, 19 57

James M Burke, having taken the oath
required by law, is at present master of the within-named vessel.

[illegible] Deputy Collector of Customs.

(8)
Port of [illegible], 19

[illegible], having taken the oath
required by law, is at present master of the within-named vessel.

[illegible] Deputy Collector of Customs.

(9)
Port of [illegible], 19

[illegible], having taken the oath
required by law, is at present master of the within-named vessel.

[illegible] Deputy Collector of Customs

(10)
Port of [illegible], 19

[illegible], having taken the oath
required by law, is at present master of the within-named vessel.

[illegible] Deputy Collector of Customs.

(11)
Port of [illegible], 19

[illegible], having taken the oath
required by law, is at present master of the within-named vessel.

[illegible] Deputy Collector of Customs.

(12)
Port of [illegible], 19

[illegible], having taken the oath
required by law, is at present master of the within-named vessel.

[illegible] Deputy Collector of Customs.

ENDORSEMENTS OF RENEWAL

Renewal No. 1. Port of Detroit, Michigan
The within-described LICENSE is hereby renewed for ONE YEAR
from March 20, 19 56

[Seal] O.O. Goodwin
Acting Deputy Collector of Customs.

Renewal No. 2. Port of Detroit, Michigan
The within-described LICENSE is hereby renewed for ONE YEAR
from March 20 1957

[Seal] O.O. Goodwin
Deputy Collector of Customs.

Renewal No. 3. Port of [illegible]
The within-described LICENSE is hereby renewed for ONE YEAR
from [illegible], 19

[Seal] [illegible]
Deputy Collector of Customs.

Renewal No. 4. Port of [illegible]
The within-described LICENSE is hereby renewed for ONE YEAR
from [illegible], 19

[Seal] [illegible]
Deputy Collector of Customs.

Renewal No. 5. Port of [illegible]
The within-described LICENSE is hereby renewed for ONE YEAR
from [illegible], 19

[Seal] [illegible]
Deputy Collector of Customs.

Renewal No. 6. Port of [illegible]
The within-described LICENSE is hereby renewed for ONE YEAR
from [illegible], 19

[Seal] [illegible]
Deputy Collector of Customs

VESSEL S. T. CRAPO
OFFICIAL No. 226885
GROSS TONS 4,769

[fol. 54]

PLAINTIFF'S EXHIBIT 2

Treasury Department
U. S. Coast Guard
CG-841 (Rev. 9-53)

File No. FS

Jan 10 1957
Donald E. Miller
Official Court Reporter
3rd Judicial Circuit

This Certificate Expires
21 March, 1957

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
UNITED STATES COAST GUARD

CERTIFICATE OF INSPECTION

VESSEL S. T. CRAPO OFFICIAL No. 226885
CLASS Freight TONS: GROSS 4,769 NET 2,942 LENGTH 392.5'
HOME PORT Detroit, Michigan OWNERS Huron Portland Cement Co.
OPERATORS Huron Portland Cement Co. 1325 Ford Bldg., Detroit 26, Mich.

The inspection of the above-named vessel having been completed at Ecorse, Michigan on the 21st day of March, 1956, I hereby CERTIFY that the said vessel was built at River Rouge in the State of Michigan, in the year 1927, rebuilt in the year .....; that the hull is constructed of Steel; is provided with ..... staterooms, ... berths; that the said vessel at the date hereof is in all things in conformity with the applicable vessel inspection laws and the rules and regulations prescribed thereunder; and is al-

lowed to carry ..... passengers, 5 persons in addition to the crew.

The following complement of licensed officers and crew is required to be carried, included in which there must be 3 certificated lifeboatmen:

1 Master & Pilot	.....Second Mate	6 Able Seamen
2 1st Class Pilots	.....Third Mate	3 Ordinary Seamen
1 2d Class Pilot	.....Inland Mate	.....Watchmen
.....Chief Mate	.....Radio Officer	.....Deckhands

1 Chief Engineer	6 Firemen
1 1st Assistant Engineer	3 Oilers
1 2d Assistant Engineer	.....Motorboat Operators
1 3d Assistant Engineer	3 Coal Passers

and also may carry 12 persons when needed in the steward's and other departments not connected with the navigation of the vessel. Total number of persons allowed 46.

When this vessel is navigated on routes of less than 16 hours on Lake Ontario, only 2 of the licensed deck officers specified are required to hold license as pilot covering the waters of Lake Ontario.

The said vessel is permitted to be navigated for one year on the Great Lakes

[fol. 59] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 60]

SUPREME COURT OF THE UNITED STATES

No. 86, October Term, 1959

HURON PORTLAND CEMENT COMPANY, ETC., Appellant,

vs.

CITY OF DETROIT, ETC., et al.

Appeal from the Supreme Court of the State of Michigan.

ORDER NOTING PROBABLE JURISDICTION—October 12, 1959

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[fol. 33]

DATA, PARTICULARS OF EQUIPMENT AND PERIODIC EXAMINATIONS

.....Wooden lifeboats for .....persons	5 Fire extinguishers, Class A II
2 Metal lifeboats for 50 persons	3 Fire extinguishers, Class B II
.....Motor lifeboats for .....persons	2 Fire extinguishers, Class C I
.....Working boats for .....persons	.....Fire extinguishers, Semi-portable Class .....
1 Liferafts for 15 persons	4 Fire extinguishers, Fixed steam 1 dry CH, 3 FL
.....Buoyant apparatus for .....persons	8 Fire axes
46 Life preservers, adult's	2 Fire pumps
.....Life preservers, children's	Fire hose, total length 300 ft.
.....Wood floats	Inspected and approved for the carriage of inflammable or combustible liquids of grade .....
.....type, line-throwing apparatus	.....
9 Ring Buoys	Capacity in barrels .....
9 Luminous Ring Buoys	
2 Anchors	
2 Cables	

Stability letter issued ....., 19.....	Main Boilers
Date drydocked 24 Feb. 1953	Number 3 Year built 1927
Propelled by steam	Mfr. Manitowoc Boiler Wks.
Tail shaft drawn —	Minimum efficiency of weakest longitudinal section 84.67 per cent
Horsepower 1800	
Pressure vessels examined 21 Mar. 1956	Record in Office at Detroit, Mich.
Blr. shells drilled 28 Feb. 1950, thk 1.23"	Mountings opened 23 Jan. 1953
	Length blr. 11'
Fuel coal	Mountings removed 23 Jan. 1953
Main steam line measured 10 Jan. 1956, thk. .276"	Diameter blr. 153"
	Date hydrostatic pressure applied 21 Dec. 1955 & 10 Jan. 1956
Aux. piping over 3" dia. tested 21 Dec. 1955	Maximum steam pressure allowed 185#

Kalhjorn Hansen
Commander, USCG (Officer in Charge,
Marine Inspection)
Detroit, Mich.

Customs Form 1270
TREASURY DEPARTMENT
[illegible]
June 1944

✓ Plaintiff's Exhibit A (p. 43)

PERMANENT OR TEMPORARY	
Permanent	
CERTIFICATE No.	30

THE UNITED STATES OF AMERICA

OFFICIAL No.	TONNAGE (GROSS AND NET)
223376	6251

TREASURY DEPARTMENT
BUREAU OF CUSTOMS

Measured at Toledo, Ohio 1923
Rebuilt at Detroit, Michigan 1928
Remeasured at Detroit, Michigan 1928
Remeasured at Detroit, Michigan 1953

Service Freight
Number of crew, INCLUDING master 36
Horsepower 1500
Coal burner

Consolidated Certificate of Enrollment and License

(NORTHERN, NORTHEASTERN, AND NORTHWESTERN FRONTIERS OF THE UNITED STATES, OTHERWISE THAN BY SEA)

In Conformity to Title L, "Regulation of Vessels in Domestic Commerce," of the Revised Statutes of the United States

WILLIAM E. CRAPO, of 254 Touraine Rd., Grosse Pointe, Michigan, SECRETARY

having taken and subscribed the oath [illegible] *required by law, and having sworn* [illegible] *that*

Huron Portland Cement Company

Incorporated under the laws of the State of Michigan

With offices at 1325 Ford Building, Detroit 26, Michigan

EXH. A

FEB 26 1957

DONALD E. MILLER
OFFICIAL COURT REPORTER
6th JUDICIAL CIRCUIT

(75 percent of the interest in the corporation owning this vessel is owned by citizens of the United States. It may engage in the coastwise trade so long as so owned and no longer.)

this vessel is owned by citizens of the United States. It may engage in the coastwise trade so long as so owned and no longer.)

I S A

[1] citizen of the United States and the sole owner of the vessel called the

[2] JOHN W. BOARDMAN (Name of vessel), of Detroit, Michigan (Home port)

and that the said vessel was built in the year [3] 1923, at Toledo, Ohio, of [4] steel

as appears by [5] P.F.R. NO. 19 issued at Detroit, Michigan, March 24, 1953. NOW SURRENDERED; "PROPERTY CHANGED."

and [6] said enrollment having certified that

the said vessel is a [10] steam screw; that she has one deck, two masts, a straight stem, and a round stern; that her register length is 340.6 tons feet, her register breadth 55.1 tons feet, her register depth 25.0 tons feet, her height tons feet; that she measures as follows: [11]

		TONS	100ths
Capacity under tonnage deck		3571	31
Capacity between decks above tonnage deck			
Capacity of enclosures on the upper deck, viz: Forecastle 91.36, bridge; poop; break			
houses—deck 174.23, side, chart 1.31, radio; excess hatchways; light and air		266	90
GROSS TONNAGE		3838	21
Deductions under Section 4153, Revised Statutes, as amended (Section 77, title 46, United States Code):			
Crew space 153.60	Master's cabin 28.38		
Steering gear 10.80	Anchor gear 7.33	Boatswain's stores 10.85	
Chart house 1.31	Donkey engine and boiler	Radio house	
Storage of sails	Propelling power (actual space 492.67) X 1.75% = 862.17		
TOTAL DEDUCTIONS		1074	44
NET TONNAGE		2763	

The following-described spaces, and no others, have been omitted, viz: Forepeak 180.51, afterpeak 19.22, other spaces (except double bottoms) for water ballast 211.30, open forecastle, open bridge, open poop, open shelter deck, cabins 14.49, companions 2.08, galley 10.92, skylights 4.35, wheelhouse 19.47, water-closets 43.82, anchor gear 4.63, condenser, donkey engine and boiler, steering gear, light and air spaces 66.45, other machinery spaces 31.36,

And [11] having agreed to the description and measurement above specified, the said vessel has been duly ENROLLED at this PORT:

LICENSE

And William H. Crapo, the master, having sworn that he is a citizen of the United States, that this license shall not be used for any other vessel, or for any other employment than is herein specified, or in any trade or business whereby the revenue of the United States may be defrauded:

LICENSE is hereby granted for the said vessel to be employed in carrying on the COASTING AND FOREIGN TRADE for ONE YEAR from the date hereof, and no longer.

her register length is 2[illegible].0 [illegible] feet, her register breadth [illegible] feet, her register depth 22.0 feet,
her height [illegible] feet; that she measures as follows: [11]

	TONS	
Capacity under tonnage deck	3571	31
Capacity between decks above tonnage deck		
Capacity of enclosures on the upper deck, viz: Forecastle 91.36 ; bridge ; poop ; break		
houses—deck 174.23 , side , chart 1.31 , radio ; excess hatchways ; light and air	266	90
GROSS TONNAGE	3838	21

Deductions under Section 4153, Revised Statutes, as amended (Section 77, title 46, United States Code):

Crew space 153.60	Master's cabin 28.38		
Steering gear 10.80	Anchor gear 7.33	Boatswain's stores 10.85	
Chart house 1.31	Donkey engine and boiler	Radio house	
Storage of sails	Propelling power (actual space 492.67) X 1.75% = 862.17		
	TOTAL DEDUCTIONS		1074 44
	NET TONNAGE		2763

The following-described spaces, and no others, have been omitted, viz: Forepeak 180.51 , afterpeak 19.22 , other spaces (except double bottoms) for water ballast 211.30 , open forecastle , open bridge , open poop , open shelter deck , cabins 14.49 companions 2.08 , galley 10.92 , skylights 4.35 , wheelhouse 19.47 , water-closets 43.82 , anchor gear 4.63 , condenser , donkey engine and boiler , steering gear , light and air spaces 66.45 , other machinery spaces 31.36 ,

And [12]
the said vessel has been duly ENROLLED at this PORT: having agreed to the description and measurement above specified,

LICENSE

And William H. Crapo , the master, having sworn that he is a citizen of the United States, that this license shall not be used for any other vessel, or for any other employment than is herein specified, or in any trade or business whereby the revenue of the United States may be defrauded:

LICENSE is hereby granted for the said vessel to be employed in carrying on the COASTING AND FOREIGN TRADE for ONE YEAR from the date hereof, and no longer.

GIVEN under my hand and seal at the PORT of Detroit, Michigan
District of Michigan , this second day of May
in the year One Thousand Nine Hundred and Fifty-Five. (1955)

F. J. Heffner
Deputy Collector of Customs.

[1] Insert name and address of person by whom oath or affirmation was made.
[2] Substitute "affirmation" when necessary.
[3] Substitute "affirmed" when necessary.
[4] Insert the name and business address of the owner. If there are two or more owners, give the name and business address of one of the owners (managing owner, if one has been designated) and the proportion owned by him, followed by the names of the other owners and the proportions owned by each. If any owner is a corporation, give the corporate name followed by the words "a corporation organized under the laws of the State of " (inserting the appropriate State name).
[5] If the vessel is owned by the United States of America, delete "citizen of the United States and."
[6] Insert the name exactly as it appeared on the preceding document or, in the case of a first document, as it appeared on the application for official number. If the vessel has borne another name or a motorboat number immediately prior to documentation or redocumentation, give such name or number in parentheses preceded by the prefix "ex" immediately following the documented name.
[7] Write "said register," "said enrollment," or "said license." In the first document of a new vessel, give the name and title of the admeasurer.
[8] For a vessel having a steam (or an internal combustion) engine write "steam (or gas or oil) sidewheel," "steam (or gas or oil) sternwheel," "steam (or gas or oil) screw," as case may be.
[9] Insert the dimensions and tonnages exactly as they appear on the preceding document (or the certificate of admeasurement in case of a change in tonnage or upon issuance of the first document).
[10] Use the name of the person agreeing to the description and measurement and the capacity in which he acts (owner, master, or agent). In the first document, the name should be that of the person countersigning the certificate of admeasurement.
[11] On the first document of a new vessel, write in this blank "certificate of —, builder." On every document other than the first, recite whether the last former document was permanent or temporary, the kind, number, date, and place of issue of such former document, whether the original or a copy of the former document was surrendered, and the reason for issue of the new document.

16 - 21816-16 U. S. GOVERNMENT PRINTING OFFICE

P43 REVERSE

PREFERRED MORTGAGE ENDORSEMENT

(MERCHANT MARINE ACT, 1920, SEC. 30—46 U. S. C., TITLE 46, CHAPTER 24)

MORTGAGE DESCRIPTION

(SUBSECTION (DC))

Mortgagor _____

Mortgagee _____

Endorsed _____, 19____, at _____ m.

Total amount, $ _____

Date of maturity _____, 19____

_____

Discharge amount, $ _____

_____

Port of _____

[SEAL]

_____

Deputy Collector of Customs.

MORTGAGE DISCHARGE

(SUBSECTION (DE))

Port of _____

_____, 19____

The sum of $ _____ *has been paid on the above-described mortgage, the certificate of such discharge being filed in this office and recorded*

_____, 19____, at _____ m.

[SEAL]

_____

Deputy Collector of Customs

Official No. 223376

Customs Form 1370

TREASURY DEPARTMENT
BUREAU OF CUSTOMS

Permanent
(Permanent or Temporary)

FRONTIER

Consolidated Enrollment and License

FOR THE

COASTING AND FOREIGN TRADE

No. 30

OF THE

steam screw

CALLED THE

JOHN W. BOARDMAN

OF

Detroit, Michigan

3838 gross, 2763 net,

ISSUED AT THE

Port of Detroit, Michigan

May 2, 19 55

WHERE SURRENDERED:

WHEN SURRENDERED:

WHY SURRENDERED:

_____

Deputy Collector of Customs

PREFERRED MORTGAGE ENDORSEMENT

(MERCHANT MARINE ACT, 1920, SEC. 30—46 U. S. C., TITLE 46, CHAPTER 24)

MORTGAGE DESCRIPTION

(SUBSECTION (DC))

Mortgagor _____

Mortgagee _____

Endorsed _____, 19____, at _____ m.

Total amount, $ _____

Date of maturity _____, 19____

_____

Discharge amount, $ _____

_____

Port of _____

[SEAL]

_____

Deputy Collector of Customs.

MORTGAGE DISCHARGE

(SUBSECTION (DE))

Port of _____

_____, 19____

The sum of $ _____ *has been paid on the above-described mortgage, the certificate of such discharge being filed in this office and recorded*

_____, 19____, at _____ m.

[SEAL]

_____

Deputy Collector of Customs

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
JUN 1 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 96

HURON PORTLAND CEMENT COMPANY,
a Michigan corporation,
Appellant,
vs.
CITY OF DETROIT, a Michigan municipal corporation,
BENJAMIN LINSKY, Chief, Bureau of Smoke
Abatement, P. J. LAREAU,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE
OF MICHIGAN

JURISDICTIONAL STATEMENT

ALFRED E. LINDBLOOM,
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Detroit 26, Michigan.

Of Counsel:
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Detroit 26, Michigan.

Interstate Brief & Record Co., 642 Beaubien St., Detroit 26, Michigan

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DETROIT ORDINANCE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.....

HURON PORTLAND CEMENT COMPANY,
a Michigan corporation,
Appellant,
vs.
CITY OF DETROIT, a Michigan municipal corporation,
BENJAMIN LINSKY, Chief, Bureau of Smoke
Abatement, P. J. LAREAU,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

JURISDICTIONAL STATEMENT

REPORTS OF OPINIONS BELOW.

The opinion of the Supreme Court of the State of Michigan is reported in 355 Mich. 227 and 93 N. W. 2d 888 (1959). A copy of that opinion is attached hereto as Appendix "A". The Wayne Circuit Court of the State of Michigan, the court of first instance, rendered an opinion which is not reported. A copy of that opinion is attached hereto as Appendix "B".

JURISDICTIONAL GROUNDS

1. This is an appeal from a decision of the Supreme Court of the State of Michigan. Appellant brought suit against the City of Detroit and the other appellees to enjoin the enforcement of the Smoke Ordinance of the City of Detroit (being ordinance No. 167-E, Chapter 184 of the Municipal Code of the City of Detroit, 1954) against it, except when the emission of the prohibited smoke is caused by improper firing or by improper use of the equipment upon its vessels on the grounds that the Smoke Ordinance is repugnant to the Constitution and laws of the United States.

The ordinance in controversy, through its inspection and penalty clauses, prohibits the use of appellant's vessels with their present equipment, although such vessels are engaged in interstate commerce and are inspected and licensed by the United States Coast Guard and are enrolled with the Bureau of Customs of the United States Treasury Department and licensed by it to engage in the coasting and foreign trade.

2. The opinion and decree of the Supreme Court of the State of Michigan was rendered and entered on the 12th day of January, 1959.

A notice of appeal to this Court was filed by the appellant with the Clerk of the Circuit Court for the County of Wayne, Michigan (that being the Court possessed of the record) on April 9, 1959.

3. The jurisdiction of this Court upon appeal is conferred by 28 U.S.C., Sec. 1257 (2). Appellant challenges the validity of an ordinance of the City of Detroit, Michigan, "a statute of the state" within the meaning of 28 U.S.C. 1257 (2), on the ground that as applied to appel-

lant's activities it is repugnant to the Constitution and laws of the United States and the decision of the highest state court to which an appeal could have been taken was in favor of validity.

4. Cases believed to sustain the jurisdiction of this Court on appeal are:

King Manufacturing Co. v. Augusta, 277 U. S. 100 (1928);
Jamison v. Texas, 318 U. S. 413 (1943);
Poulos v. New Hampshire, 345 U. S. 395 (1953);
West Point Grocery Company v. Opelika, 354 U. S. 390 (1956);
Independent Warehouse v. Scheele, 331 U. S. 70 (1947);
Staub v. City of Baxley, 355 U. S. 313 (1958);
Breard v. Alexandria, 341 U. S. 622 (1951);
Fiske v. Kansas, 274 U. S. 380 (1927).

5. The ordinance here involved, is ordinance No. 167-E and is Chapter 184 of the Municipal Code, City of Detroit, 1954. This is a comprehensive ordinance seeking to prohibit the emission of the kinds of smoke, dust, fumes, etc. defined in the ordinance. The ordinance is lengthy and most of its provisions are not questioned in this suit. The provisions that are involved are hereinafter set forth.

Section 2.2A of the ordinance, p. 514, of the Detroit Municipal Code, 1954, provides:

> "It shall be unlawful within the City of Detroit for any person, firm or corporation to permit the emission of any smoke from any source whatever of a density equal to or greater than that density described as No. 2 of the Ringlemann Chart; Provided, That the following exceptions to the provisions of this section shall be permitted:

"(a) Smoke, the shade or appearance of which is equal to but not darker than No. 2 of the Ringlemann Chart for a period, or periods, aggregating four minutes in any 30 minutes;

"(b) Smoke, the shade or appearance of which is equal to but not darker than No. 3 of the Ringlemann Chart for a period, or periods, aggregating three minutes in any 15 minutes, when building a new fire or when breakdown of equipment occurs such as to make it evident that the emission was not reasonably preventable."

Section 2.16 of the same ordinance, p. 518 of said Code, provides:

"It shall be unlawful for any person, firm or corporation to use or operate any furnace or other combustion equipment or device which is subject to annual inspection, as hereinafter set forth, without a certificate of operation; provided, however, that if application for such certificate of operation has been made and the required inspection fee paid, it shall be lawful to use such furnace or other fuel-burning equipment or device until receipt of such certificate or until notification by the Bureau of its refusal to grant such certificate."

Section 2.17 of the same ordinance, p. 518 of said Code, provides:

"Every furnace or other combustion equipment or device shall be inspected annually and a report and permanent record made of such inspection by the Bureau except the following:

"(1) Furnaces or other combustion equipment or devices installed to heat buildings used exclusively for private residences containing less than three dwelling units or flats, and

'(2) Combustion equipment or devices used exclusively for private residences which do not contain a central heating plant."

Section 2.20 of the same ordinance, p. 518 of the Detroit Municipal Code, provides:

> "After any owner, agent, occupant, manager or lessee of any premises has been previously notified of three or more violations of this Ordinance within any consecutive 12-month period, in respect to the emission of smoke, soot, cinders, noxious acids, fumes, gases, fly ash or industrial dusts, the owner, agent, occupant, manager or lessee of said premises shall be notified to show cause before the Commissioner not less than ten days from the date of notice, why the equipment causing such violation should not be sealed.
>
> "(a) The notice herein provided for may be given by mail directed to the last known address of the party to be notified, or if said party or his whereabouts is unknown, then by posting a notice on or near the premises at which the violations shall have occurred. Upon said date said violator may appear and be heard. Upon such hearing, if the Commissioner finds that adequate corrective means and methods have not been employed to correct the cause of such condition then it shall be his duty to seal said equipment until such time as a permit and certificate as herein provided have been applied for and issued for said plant.
>
> "(b) It shall be unlawful for any person to break a seal of any refuse burning equipment, any boiler or any equipment or device producing heat or power, that has been duly sealed by the Commissioner or his authorized representative."

Section 2.21 of the same ordinance, p. 519 of the Detroit Municipal Code, provides:

> "When a certificate of operation is refused in the case of an original inspection or a case of an annual inspection, the Commissioner is authorized to seal, immediatey, the furnace or other combustion equipment until the owner, lessee or other person required to procure the certificate of operation shall have complied with the provisions of this Ordinance."

Section 3.2 of the same ordinance, p. 521 of the Detroit Municipal Code, provides:

> "Any person, persons, firm, partnership, association or corporation or any one acting in behalf of said person, persons, firm, partnership, association or corporation violating any of the provisions of this Ordinance shall upon conviction thereof be subject to a fine or not more than one hundred dollars ($100.00) or to imprisonment in the Detroit House of Correction for a period of not more than thirty (30) days, or to both such fine and imprisonment in the discretion of the court. Each day that a violation of this Ordinance is continued or permitted to exist without compliance shall constitute a separate offense punishable upon conviction in the manner prescribed in this section."

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Where Congress has by Statute 46 U.S.C., Chapter 14, provided for the inspection and licensing of vessels engaged in interstate and foreign commerce on the Great Lakes and appellant's vessels, which are engaged in interstate commerce, have been inspected by the United States Coast Guard and have been granted permission to navigate on the Great Lakes and have been enrolled and li-

censed by the Treasury Department of the United States to carry on coasting and foreign trade, is the Smoke Ordinance of the City of Detroit, Michigan valid as to said vessels, when such ordinance provides for the inspection of the boilers on the vessels and prohibits their use, and are the penalty provisions of said ordinance valid as to appellant's vessels when the prohibited smoke cannot always be prevented by the boilers inspected, approved and licensed by the United States?

2. Where the Smoke Ordinance of the City of Detroit, Michigan provides for the inspection of combustion equipment and prohibits use of certain kinds of boilers and equipment on vessels engaged in interstate and foreign commerce on the Great Lakes, and prohibits the emission of smoke which cannot be prevented at all times with boilers and equipment commonly used on the Great Lakes, does such ordinance unduly burden interstate and foreign commerce in matters where uniformity is necessary under the Commerce Clause of the United States Constitution, Article I, Section 8, Cl. 3?

STATEMENT OF THE CASE

The bill of complaint, filed in this case, sought to enjoin the appellees from prosecuting two criminal cases brought against appellant under the Smoke Ordinance and to enjoin the enforcement of said ordinance against appellant, except when the emission of the prohibited smoke is caused by improper firing or by the improper use of the equipment upon appellant's vessels. The bill claimed that the Commerce clause of the Constitution of the United States gave Congress full and complete authority to regulate and control foreign and interstate commerce and that Congress had exercised such control in respect to steam vessels engaged in interstate commerce on the Great Lakes.

It was further alleged that appellant's fleet consisted of four steamships equipped with hand fired scotch marine boilers and one motor vessel, which is diesel powered, and that the emission of the kind of smoke prohibited by the Smoke Ordinance could not at all times be prevented on the vessels equipped with hand fired scotch marine boilers.

The pleadings and the testimony disclosed that, at the time of trial, appellant had acquired one more steamship equipped with hand fired scotch marine boilers and that all of said vessels were periodically inspected by the United States Coast Guard. There was introduced in evidence as Plaintiff's Exhibit "2" a Certificate of Inspection issued by the United States Coast Guard in respect to appellant's steam ship, S. T. Crapo, which Certificate, after describing the vessel, contained the following language: "The said vessel is permitted to be navigated for one year on the Great Lakes." The testimony disclosed that there was such Certificate for each vessel.

There was also introduced as Plaintiff's Exhibit "A" a Consolidated Certificate of Enrollment and License issued by the Treasury Department of the United States, Bureau of Customs, in respect to appellant's steamship John W. Boardman. This Certificate and License contained the following language: "License is hereby granted for said vessel to be employed in carrying on the COASTING AND FOREIGN TRADE for ONE YEAR from the date hereof and no longer." Such Certificate and License had been issued for each vessel.

The Supreme Court of Michigan in its opinion states: "It is conceded that the vessels operate in interstate commerce" (App. A, p. 2a). The said vessels are used to transport bulk cement from appellant's mill at Alpena, Michigan to its distributing plants in various cities on the

Great Lakes in Michigan, Ohio, New York, Minnesota and Wisconsin. The trial court in its opinion says: "It is agreed it is impossible to prevent emission of the kind of smoke prohibited by the smoke ordinance if the vessel is equipped with hand fired scotch marine boilers" (App. B. p. 12a).

The testimony shows that all of the appellant's vessels are self-unloaders and that it is necessary to unload bulk cement with these self-unloaders; otherwise, an excessive amount of dust is caused. It also appeared that it is necessary to keep up full steam during the unloading operations and that when the fire is cleaned it is impossible to prevent the kind of smoke prohibited by the Ordinance.

One of the criminal cases sought to be enjoined was against the appellant, the captain and chief engineer of the John W. Boardman and the other was against the appellant, the captain and chief engineer of the S. T. Crapo. In both of the criminal cases the appellees claim that the Smoke Ordinance was violated while the vessels were docked and unloading.

In its bill of complaint, appellant alleges that at that time the firing was proper and the emission of the smoke complained of could not have been prevented with the equipment on the vessels. Appellees, in their answer (par. 9) admit that at the time of the violation on Steamship John W. Boardman it was found that the equipment was properly used. In respect to Steamship S. T. Crapo, appellee Lareau was refused access to the vessel and could not state whether or not the equipment on said vessel was properly used during the period of violation.

Appellant, in its bill of complaint, alleges that appellees claim that the Smoke Ordinance is applicable to its fleet and that appellees have threatened to enforce the ordi-

nance even when the objectionable smoke cannot be prevented with the present equipment. The testimony indicated that the ordinance could be complied with if oil burning equipment is substituted for the hand fired scotch marine boilers or in all likelihood if a well designed underfeed stoker is added. The testimony showed that it would cost roughly $70,000 to equip either the Steamship Boardman or the Steamship Crapo with stokers and at least $100,000 each to equip them with oil burning equipment.

At the trial, appellant urged that its equipment had been approved by the United States Coast Guard under the Acts of Congress and had been licensed to engage in the coasting and foreign trade upon the Great Lakes and that the City of Detroit could not constitutionally enforce against it, the Smoke Ordinance which could be complied with only if appellant substituted other equipment. Appellant contended that Congress had pre-empted the field through the enactment of statutes governing the inspection and licensing of steamships engaged in interstate commerce on the Great Lakes and that the Smoke Ordinance unduly burdened interstate commerce in matters where uniformity is necessary and that the Ordinance was unconstitutional under the Commerce Clause even if Congress had not expressly pre-empted the field.

After trial of the matter, the trial court filed a written opinion which is attached hereto as Appendix "B" and entered a decree dismissing the bill of complaint. Upon appeal to the Supreme Court of Michigan (the court of last resort), that Court affirmed the decision of the trial court and its opinion is annexed hereto as Appendix "A".

RAISING THE FEDERAL QUESTIONS BELOW

The constitutional points which appellant raises on this appeal, were initially raised by the pleadings. Appellant attacked the validity of the ordinance in question in its bill of complaint as being repugnant to the Commerce Clause of the United States and the laws of the United States. The court of first instance, dismissed the bill of complaint.

The fact that the Federal questions were adequately and properly raised was recognized by the Supreme Court of Michigan in its Opinion. It said:

> "In the exercise of its constitutional power to control interstate commerce the Congress of the United States has provided for extensive control and inspection of American vessels on the Great Lakes. It is the contention of appellant that by such legislation Congress has pre-empted the field and that therefore the ordinance in question is invalid." (App. A, p. 2a.)

The Supreme Court of Michigan also said:

> "Appellant also argues that whether or not Congress has expressly pre-empted the field of smoke abatement, the Detroit ordinance unduly burdens interstate and foreign commerce in matters where uniformity is necessary." (App. A, p. 6a.)

This Court will accept the recognition by the state court that the Federal questions were properly raised in that court. *Charlestown Federal Savings and Loan Association v. Alderson*, 324 U. S. 182 (1945).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Appellant here attacked the validity of the ordinance on the grounds that, as to appellant's fleet, it is repugnant to the Commerce Clause of the Constitution of the United States and the laws of the United States.

Kelly v. Washington, 302 U. S. 1, 4 (1937). In speaking of the Congressional regulations of navigation, it was said:

> "The federal acts and regulations with respect to vessels on the navigable waters of the United States are elaborate. They were well described in the argument of the Assistant Solicitor General as a maze of regulation. Provisions with respect to steam vessels are extremely detailed."

46 U.S.C., Sec. 392 provides that the Coast Guard shall inspect each year the boilers, unfired pressure vessels * * * equipment, etc. of vessels subject to inspection, other than passenger vessels. This Act was amended by Act of June 4, 1956, 70 St. 224, to provide for the bi-annual inspection of vessels and the last sentence of Subsection (c) of this section is as follows:

> "No boiler, unfired pressure vessel or appurtenance thereof shall be allowed to be used if constructed in whole or in part of defective material or which because of its form, design, workmanship, age, use, or for any other reason is unsafe."

The United States Coast Guard, after inspecting appellant's fleet, granted each vessel a Certificate of Inspection, which included the following: "The said vessel is permitted to be navigated for one year on the Great Lakes." Each vessel was enrolled with the Bureau of Customs, Treasury Department of the United States and was granted

a Consolidated Certificate of Enrollment and License, which included: "License is hereby granted for the said vessel to be employed on the COASTING AND FOREIGN TRADE for ONE YEAR from the date hereof and no longer."

Gibbons v. Ogden, 9 Wheat 1 (1824):

> "The word 'license' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the rights which the grantor can transfer, to do what is within the terms of the license."

Admittedly, Congress under the Commerce Clause has authority to control interstate commerce and the two licenses, above referred to, under the *Gibbons* case transfer to appellant's vessels the right to navigate the Great Lakes. The licenses include the right to use the vessels as equipped when inspected and when enrolled.

Can a municipality, through an ordinance, even though designed to prevent excessive smoke, subject the equipment on these same vessels to inspection and forbid their use until a certificate of operation is issued, and may a municipality punish criminally the owner of such vessels for the emission of smoke which cannot be prevented with the equipment upon the vessel when licensed?

It is clear that the Detroit ordinance can be complied with by most of appellant's fleet *only* if the equipment on those vessels is changed. The penalty provision of this ordinance is, certainly, in conflict with the licenses because the licensee is, and can be punished for doing that which cannot be prevented with the license equipment.

The City of Detroit has not so far attempted to enforce the inspection provisions, Sec. 2.16 and 2.17 of the ordinance against vessels. However, if the ordinance is held valid, the City will, no doubt, insist that vessels be inspected and inasmuch as it is conceded that the prohibited smoke cannot be prevented by the equipment on the vessels, it follows that the Certificate of Operation provided for in Sec. 2.16 would not issue. Hence, the vessels could not be operated at all, although granted permission by the United States to engage in navigation upon the Great Lakes.

Under Sec. 2.20 of the ordinance, if the owner has been notified of three or more violations of the ordinance in any consecutive twelve month period, the equipment must be sealed, unless it is found that adequate corrective means and methods have been employed to correct the cause of the condition. Here, again, if this provision is enforced and it, undoubtedly, will be if the ordinance is held valid, the vessels could not be used even though licensed by the United States.

Serrice Storage and Transfer Co. v. Commonwealth of Virginia, 79 S. Ct. 714 (1959). Petitioner had been granted a certificate by the Interstate Commerce Commission to engage as a motor carrier between certain points. Freight from and to points in Virginia was routed through West Virginia. Virginia claimed that this was a sham and, that, the petitioner was guilty of engaging in intrastate freight business without permission and fined the petitioner $3,500. Held:

> "To uphold the criminal fine here assessed would be tantamount to a partial suspension of petitioner's federally granted certificate."

This Court has had occasion to pass upon the Boiler Inspection Act, Secs. 22-34 of Title 45, U.S.C., which provides

for inspection of railroad locomotives. That Act is quite similar to the Act governing the inspection of steamships. It was there held that Congress had pre-empted the field and states cannot validly enact statutes requiring certain equipment, even though the Interstate Commerce Commission had made no order in respect to this equipment.

Napier v. Atlantic Coast Line Railroad, 272 U. S. 605 (1926). In Georgia a statute was passed requiring automatic fire doors on locomotives and in Wisconsin another statute was passed requiring cab curtains during the winter. It was held that both of these statutes were void even if the Interstate Commerce Commission had made no order requiring a particular type of fire door or cab curtain, holding that the Boiler Inspection Act conferred upon the Interstate Commerce Commission the exclusive power to specify the sort of equipment to be used on locomotives.

The Court said:

> P. 612: "Did Congress intend that there might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?
>
> The federal and state statutes are directed to the same subject—*the equipment of locomotives.* They operate upon the same subject. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of

> the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standards set by the Commission must prevail, requirements of the states are precluded, *however commendable or however different their purpose.*" (Emphasis added.)

There has been discussed so far the question of whether Congress under the Commerce Clause has by its acts concerning navigation and steamships pre-empted the field to the extent of precluding a municipality from enacting an ordinance which indirectly regulates the equipment which may be used on steamships. There has also been discussed the question of whether a municipality may indirectly prevent the use, in interstate commerce and navigation, of a steamship licensed by Congress to engage in interstate commerce. Both of these questions are substantial and are of extreme importance to vessels engaged in navigation upon the Great Lakes.

In the Supreme Court of Michigan, in this case, there were several *amicus curiae* briefs filed. One was filed on behalf of Lake Carriers' Association. In this brief, it was stated in a footnote: "At the close of the 1957 navigation season the combined Canadian (282 vessels) and United States (415 vessels) Great Lakes commercial fleet totaled 697 vessels, including carferries and passenger steamers. While the accurate figures are not available, it is estimated that of the total fleet, 463 burned coal for fuel, 277 being hand fired, of which 256 have hand fired scotch marine boilers." Undoubtedly, a great many of these vessels dock at Detroit or pass through waters within the boundary of the City of Detroit, to-wit, the Detroit River. Hence, the validity of this ordinance, as applied to steam vessels

engaged in interstate commerce, is extremely important as the cost of converting those vessels to equipment required to comply with the Detroit ordinance is almost fantastic.

There still remains one other Federal question which is also substantial. Assuming that Congress has not preempted the field to the extent of precluding this ordinance, and if the City of Detroit may enforce the provisions of this ordinance in spite of the licenses above referred to, there still remains the question of whether this ordinance unduly burdens interstate commerce in matters where uniformity is necessary.

It is apparent that if this ordinance is valid, other municipalities or states along the Great Lakes could pass different and varying smoke ordinances. Thus, a vessel might have equipment which would enable it to comply with the ordinance of the City of Detroit, but Chicago, Toledo or some other city could pass an ordinance with different requirements. It is no practical answer to say that a vessel should install the equipment which will enable it to comply with the most severe ordinance, since it could then comply with all, because if one complies with the most severe ordinance at a given time, one more severe may be passed. There is included in this thought the belief, that one is safe because if a more severe ordinance is passed, the courts would hold the later one unreasonable, but, of course, that does not follow, courts can and do differ, so while one court might hold the later ordinance unreasonable, another might not, all of which goes to show that this is a question which requires uniformity of treatment.

Morgan v. Virginia, 328 U. S. 373, 377 (1945). The provisions of the Virginia Code required separation of white and colored passengers on both interstate and intrastate

motor carriers. The claim was made that this statute burdened interstate commerce, contrary to the Commerce clause even if Congress had enacted no legislation on the subject. The state claimed that this statute was passed under the police power to avoid friction between the races. The Court held the statute unconstitutional as applied to interstate passengers or vehicles moving in interstate and said:

> "There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the Constitutional sense of useful in accomplishing a permitted purpose. *Where uniformity is essential for the functioning of commerce a state may not interpose its local regulation.*" (Emphasis added.)

Southern Pac. v. Arizona, 325 U. S. 761 (1945). Arizona statute limited passenger trains to fourteen cars, freight trains to seventy cars. The Court said, p. 773:

> "Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application."

> Page 775: "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the state enacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal

points before entering and after leaving the regulating state. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent."

Kelly v. Washington, 302 U. S. 1 (1937). Here the State of Washington passed a comprehensive and complete Code of Inspection and Regulation of every vessel operated by machinery "which is not subject to inspection under the laws of the United States." The Court said, p. 14:

> "*Third.* The remaining question is whether the state law must fall in its entirety, not because of inconsistency with federal action, but because the subject is one as to which uniformity of regulation is required and hence, whether or not Congress has acted, the State is without authority. *Cooley v. Board of Wardens*, 12 How. 299, 319; *Minnesota Rate Cases*, 230 U. S. 352, 399, 400.
>
> "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, *Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States.* The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on." (Emphasis added.)

The burden on interstate commerce in the three cases above cited is less severe than the burden upon interstate commerce in the case at bar. The burden on interstate commerce in this case is extremely severe since it is un-

disputed that it will cost from about $70,000 to $100,000 per vessel to supply the equipment needed to comply with the Detroit ordinance. If it is remembered that other cities or governmental units may pass other statutes or ordinances requiring different equipment, the cost is prohibitive.

The Detroit ordinance here involved is certainly a direct burden on interstate commerce because it says, in effect, through its penalty and inspection clauses that a vessel may not be used in interstate commerce unless and until such vessel has that equipment which will enable it to meet the requirements of the Detroit ordinance. To argue that the Detroit ordinance only incidentally or indirectly affects interstate commerce and navigation is to lose sight of the fact that the ordinance as effectively prohibits the use of a vessel equipped with hand fired scotch marine boilers as if it directly provided that no vessel engaged in interstate commerce shall pass through the Detroit River if it is equipped with a hand fired scotch marine boiler. The Detroit ordinance affects interstate commerce beyond the boundaries of Detroit also, because if equipment is installed in vessels to comply with the Detroit ordinance, that same equipment must be used at all times by the vessel since the equipment cannot practically be removed when the vessel leaves Detroit. This is one of the points made in the case of *Southern Pacific v. Arizona*, 325 U. S. 761 (1945).

The decision of the Supreme Court of Michigan sustaining the validity of the Detroit Smoke Ordinance should not be permitted to stand in open defiance of the existing pronouncements of this Court. The effect of that decision is to prohibit the use in interstate commerce of a large percentage of the steamships navigating the Great Lakes. The effect of that decision is also to render practically worth

less the licenses granted by the Federal Government and it takes from Congress the right to control the vessels engaged in interstate commerce.

THIS CASE IS WITHIN THE JURISDICTIONAL PROVISIONS RELIED ON AND THE CASES CITED TO SUSTAIN JURISDICTION

This appeal is taken pursuant to 28 U.S.C., Sec. 1257 (2) which confers appellate jurisdiction upon this Court to review final judgments by the highest court of a state in which a decision could be had when there is drawn in question the validity of a state statute on the grounds of it being repugnant to the Constitution and the laws of the United States and the decision of the state court is in favor of validity.

This Court has many times held that a "statute" within the ambit of *28 U.S.C.*, Sec. 1257 (2) means more than a state law enacted by the general legislative authority and that it encompasses municipal ordinances, municipalities being political subdivisions of the state. *King Manufacturing Co. v. Augusta*, 277 U. S. 100 (1928); *Jamison v. Texas*, 318 U. S. 413 (1943); *Poulos v. New Hampshire*, 345 U. S. 395 (1953).

There can be no question that the judgment of the Supreme Court of Michigan is a final judgment. The decree in favor of the appellee in the trial court entered after a trial upholding the validity of the ordinance was affirmed by the Supreme Court of Michigan, the highest Court in Michigan in which a decision can be had.

CONCLUSION

Appellant respectfully suggests that this appeal brings before the Court federal questions under the Constitution and laws of the United States, which are far reaching and important in terms of legal principle and practical impact on navigation, interstate commerce and the control thereof and the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for the resolution.

Respectfully submitted,

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APPENDIX "A"

STATE OF MICHIGAN—SUPREME COURT

OPINION OF THE SUPREME COURT OF MICHIGAN

(Filed January 12, 1959)

BEFORE THE ENTIRE BENCH.

VOELKER, J.

The defendant city of Detroit has a comprehensive ordinance (No. 167-E) entitled "Smoke Abatement Code" which provides that it shall be unlawful within that city to permit the emission of smoke of a density equal to or greater than that described as No. 2 Ringlemann Chart (a standard accepted way of measuring the density of smoke). This ordinance allows certain temporary exceptions which are not now relevant. It also provides that after an owner has been warned of 3 violations within a 12 month period the commissioner, a city official, shall serve notice on the owners and seal the offending equipment unless he finds that adequate corrective steps have been taken. It also provides for the inspection of equipment and for fines and imprisonment for failure to comply with the ordinance.

On December 20, 1955 the city of Detroit filed complaints in the traffic and ordinance division of the recorder's court thereof against plaintiff-appellant, owner of the steamships John W. Boardman and S. T. Crapo for allowing the emission of dense smoke at the port of Detroit contrary to the provisions of the ordinance in question.

Appellant then filed suit in circuit court to enjoin the city of Detroit and the other defendants from prosecuting

the complaints, and an order was entered granting such an injunction during the pendency of this suit. Thereafter in circuit court the plaintiff claimed that the ordinance was unconstitutional as to it except in those instances where the objectionable smoke is caused by improper firing or by the improper use of the equipment on the vessel. It is conceded that the vessels operate in interstate commerce. The trial court held that the ordinance was constitutional and that it was a necessary and reasonable exercise of the local police power. From a decree to that effect plaintiff has appealed.

In the exercise of its constitutional power to control interstate commerce the Congress of the United States has provided for extensive control and inspection of American vessels on the Great Lakes. It is the contention of appellant that by such legislation Congress has preempted the field and that therefore the ordinance in question is invalid.

The relationship between state and congressional power to control interstate commerce is well stated in 15 C. J. S., Commerce §11, p. 268 as follows:

> "However, the constitutional grant to congress of power to regulate interstate commerce, although operating of its own force to curtail state power in some measure, does not forestall all state action affecting interstate commerce; it does not withdraw from the states power to legislate in respect of their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce. Although state legislation affects interstate commerce incidentally, indirectly, or remotely, yet where it does not undertake to regulate such commerce and is no more than a *bona fide*, legitimate, and reasonable exercise of the reserved police power of the state in respect of a matter of local or internal concern, it is valid and * * * will stand,

in the absence of conflicting and superseding legislatio by congress in the exercise of its superior authority to regulate commerce among the sfates. * * *"

Appellant's first question on appeal thus falls naturally into 3 parts: 1: Does the ordinance conflict with any federal legislation? 2: Does it seek to regulate interstate commerce? 3: Is it a reasonable exercise of local police power?

To determine the first part of that question we must look at the scope and intent of the congressional legislation and then examine the ordinance in question to see if it pertains to the same subject matter. The federal legislation cited in appellant's brief, U. S. C. A., Title 46, Ch. 14, is, so far as we can determine, intended primarily for the protection and safety of vessels and their passengers, crew and cargo. None of the federal legislation in this field is to our knowledge designed or enacted for the protection of persons and property on land. Appellant has cited none in its brief. (See 1951-52 O. A. G., p. 370 to the effect that the United States Coast Guard so interprets the applicable federal legislation.) It appears to us that the ordinance and the federal legislation deal with basically different subject matter and are thus not in such conflict that the former must bow.

A quick glance at the title of the ordinance, "Smoke Abatement Code," is sufficient to learn its intent. Even the most casual reading of it indicates clearly that its sole purpose is to protect the health and welfare of the residents of Detroit by preventing the emission of dense smoke into the air which the people must breathe.

Thus paragraphs 2 and 3 of the preamble to the ordinance provide:

> "Whereas, the excessive emission of dense smoke within the corporate limits of the City of Detroit and the resultant effect upon the public health and welfare require the adoption of a comprehensive and integrated plan of smoke control; and
>
> "Whereas, in conjunction with the smoke control program it is desirable to adopt appropriate regulations to reduce air pollution caused by excessive soot, cinders, fly ash, dust, noxious acids, fumes and gases, the emission of which is detrimental to the health and welfare of the residents of the City; now, therefore,"

We think the ordinance before us is clearly aimed at the prevention of air pollution and not at any regulation of interstate commerce. If it affects interstate commerce at all we think it is only indirect and accidental.

Little need be said on the subject of whether or not this ordinance is a reasonable exercise of local police power. We think that by now it is sufficiently clear without citation of authority that excessive air pollution by dense smoke cannot be anything but harmful to the health and welfare of a community. Indeed in 1955 Congress appropriated $5,000,000 a year for 5 years for research into and control of the increasingly vexing problem of air pollution. (We also note that the first national conference on air pollution was held in Washington, D. C. during November, 1958. The National Cancer Institute is presently studying the problem but as of this writing has announced no results. See science section of Saturday Review for November 8, 1958.)

We note further that the preamble to the above mentioned congressional appropriation statute says in part:

> "* * * it is declared to be the policy of Congress to preserve and protect the primary responsibilities

> and rights of the States and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies and other public or private agecies and institutions in the formulation and execution of their air pollution abatement research programs. * * *" USCA, Title 42, Ch. 15B, §1857.

Regarding this appropriation statute appellant correctly states in its reply brief:

> "* * * In that Act Congress was not attempting to give up its inspection of vessels, locomotives, motor carriers and other things that might conceivably cause or be involved in smoke pollution."

That however is not the question before us. The point is that the ordinance does not seek to supersede or replace any existing provisions of Congress either in the realm of air pollution or for the inspection of vessels, as already noted. Its purpose is simply to control to some extent the emission of unnecessary smoke in a community so as to protect the health and welfare of its inhabitants. The portion of the statute quoted above indicates to this Court that the ordinance in question is not only a reasonable exercise of local police power but that such actions by local authorities have the recent blessing and financial encouragement of Congress itself.

On the other hand we reluctantly realize that the pastoral pine-scented days of yore are gone forever, and that our society has become dependent upon vast conglomerates of power of which smoke is all to frequently an unwanted by-product. Thus the elusive question of the reasonableness of such local legislation boils down to one of rela-

tivity. An ordinance of this type may be said to be reasonable only if it does not unduly hamper industry and our continual need for power. It does not follow, however, that if we cannot have smokeless cities that men must compose themselves and dwell in an ever-deepening pall of smoke. If this ordinance sought to prevent the emission of all smoke, or if adequate means of smoke control were not available, then a different question might be before us. But this ordinance concededly seeks to outlaw only the emission of smoke of such density that can readily be prevented by the use of modern smoke control equipment. All it costs is money. We find and hold that the ordinance in question is a reasonable exercise of the local police power and as such does not unduly interfere with interstate commerce.

Appellant also argues that whether or not Congress has expressly pre-empted the field of smoke abatement, the Detroit ordinance unduly burdens interstate and foreign commerce in matters where uniformity is necessary. Appellant bases its arguments on this score primarily on the fear that local legislation might be inconsistent, that is, that upon meeting Detroit's ordinance it may in the future have to change its equipment again to meet even stricter requirements at some other port. This is a clear possibility we certainly do not deny. We do not see however why this ordinance should be held invalid simply because of the possibility that another ordinance might another day be enacted in another place that is even more stringent. Sufficient unto the day is the evil thereof; we will endeavor to cross that smoke-fogged bridge when we come to it. We do not discern it in this case.

As noted, if appellant meets only the minimum requirement of this ordinance it might very well become a burden on it to meet more stringent future requirements as they

are enacted. Because of this possibility it would have us strike down the present ordinance. We suggest that such a burden might be avoided if appellant sought to meet the spirit rather than the letter of this present ordinance. This could concededly be done by installing modern equipment and available processes of firing that would reduce smoke to the least possible density. If some future ordinance goes beyond this appellant or someone in its shoes might have a better and a more persuasive basis for a claim of unreasonable burdensomeness.

In an analogous case involving a Georgia statute that required the use of a certain type of headlight on railroad engines, the United States supreme court spoke as follows in answer to arguments strikingly similar to those presented in this case (Atlantic C. L. R. Co. v. Georgia, 234 U. S. 280):

> "In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal action, the use of such agencies, which, unless carefully guarded, was fraught with danger to the community, should go unregulated, and that the states should be without authority to secure needed local protection. The requirements of a state, of course, must not be arbitrary, or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state, in the exercise of a similar power, may not impose the same regulation, * * *
>
> "If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced,—

> if there appears to be need of standardization of safety appliances, and of providing rules of operation which will govern the entire interstate road, irrespective of state boundaries,—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the state, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress, in its control of interstate commerce, to establish such regulations as, in its judgment, may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

We concede that this subject is one that might well call for uniform legislation of federal scope, but until that happens we are not persuaded that our citizens must patriotically gag, choke and grope with obedient resignation until that happy day arrives. Nor are we persuaded that short of any such uniform legislation that local governments are in the meantime powerless to make a proper exercise of their police power.

Appellant cites McMorran v. Cleveland-Cliffs Iron Co., 253 Mich. 65, where this Court reversed that portion of the chancellor's decree below restraining as a nuisance the smoke from the stacks of certain coal-burning lake vessels while tied up at a coaling dock at Port Huron. No smoke ordinance was there involved; the opinion does not indicate that further smoke abatement was there readily available; the plaintiff householders there had moved into the area after these conditions had already long existed; and the smoke from the lake vessels was but a fraction of the general smoke, soot, dust and noise which had long existed, emanating mostly from stationary industrial

installations. Our opinion there indicates that the smoke from the vessels was but a reasonable incident of navigation. That case and others cited by appellant are not controlling of our decision here.

The judgment below is affirmed, but without costs, both a public question and public legislation being involved.

APPENDIX "B"

CIRCUIT COURT FOR THE COUNTY OF WAYNE,
IN CHANCERY

OPINION OF THE CIRCUIT COURT FOR THE COUNTY OF WAYNE, MICHIGAN

(Filed April 18, 1957)

Plaintiff manufactures and sells cement, with a mill at Alpena, Michigan, and distributing plants at Detroit, Saginaw and Muskegon, Michigan, Toledo and Cleveland, Ohio, Buffalo and Oswego, New York; Duluth, Minnesota and Milwaukee and Green Bay, Wisconsin. It maintains a fleet of vessels to transport bulk cement from the Alpena mill to the distributing plants, the fleet consisting of the steamships John W. Boardman, S. T. Crapo, Samuel Mitchell, E. M. Ford, and the motor vessel Paul H. Townsend. An additional steamship, E. C. Collins, will be added to its fleet within a year or two. All of the vessels with the exception of the motor vessel Paul H. Townsend, which is diesel powered, are equipped with hand-fired scotch marine boilers.

Steamships John W. Boardman and S. T. Crapo are self unloaders, the power being supplied by boilers; the Samuel Mitchell has its unloading equipment operated by electricity from shore installations; only three docks have such shore installations so the Samuel Mitchell calls only at these ports. The E. M. Ford has a diesel motor which powers the unloading equipment.

The City of Detroit's smoke abatement ordinance, No. 167-E, provides that it shall be unlawful within the city

for any person, firm or corporation to permit the emission of smoke of a density equal to or greater than density described as No. 2 on the Ringlemann Chart, with the exception that smoke equal to No. 2 is permitted for a period or periods aggregating four minutes in any 30 minutes, and smoke equal to No. 3 on the Ringlemann Chart is permitted for a period or periods aggregating three minutes in any 15 minutes when building a new fire or the like.

The ordinance provides for annual inspection of combustion equipment or furnace used, with some exceptions, and makes it unlawful in Section 2.16 to use such equipment without a certificate of operation which issues only after inspection. Section 2.20 provides that after any owner has been previously notified of three or more violations within any consecutive twelve-month period, the commissioner shall serve a notice upon the owner and shall seal the equipment unless the commissioner finds that adequate corrective means have been employed to correct the unlawful emission. A fine of $100 or imprisonment in the Detroit House of Correction for a period of not more than thirty days, or both, such fine and imprisonment, are provided. Each day that a violation of the ordinance is continued or permitted shall constitute a separate offense.

On December 20, 1955, two suits were started in the Recorder's Court for the City of Detroit, Traffic and Ordinance Division, naming the company as defendant as well as Kenneth Sanehagrin, Captain, and Arthur Johnson, Chief Engineer, of the S. S. Crapo; J. Burke, Captain of the S. S. John W. Boardman; Edward Pugh, Chief Engineer, of the Boardman. Suit K 996-600 charged that the John W. Boardman emitted smoke from its stack for a period of nine minutes between 10:42 A. M. and 11:02 A. M., on December 12, 1955, while docked at the foot of Riopelle Street in the City of Detroit, and suit No. K 996-601, charged the S. S. Crapo emitted dense smoke for a period

of 9¾ minutes between 11:49 A. M. and 12:03 P. M., the same day at the same location.

Plaintiff herein brought suit to enjoin the City of Detroit from prosecution of its two suits in Recorder's Court and an order was entered against the city to "desist and refrain from the further prosecution of the two cases now pending against plaintiff and others" and "from issuing any tickets or warrants for arrest or in any manner attempting to enforce said ordinance No. 167-E" against "plaintiff, the officers, members of the crews of its vessels, unless the emission of said smoke be caused by improper firing or by improper use of the equipment upon said vessel."

It is conceded that the equipment on the John W. Boardman was properly used but the City can not state whether the equipment was properly used on the S. T. Crapo since representatives of the City were refused admission to board this vessel.

It is agreed it is impossible to prevent emission of the kind of smoke prohibited by smoke ordinance if the vessel is equipped with hand-fired scotch marine boilers. The Boardman has two boilers each with two doors and one steam air jet over each door. The Crapo has three boilers, each with two doors and one steam air jet over each door. The steam jets being installed at the suggestion of Benjamin Linsky, former Chief of the Bureau of Smoke Abatement for the City.

Testimony showed also that the plaintiff used a chemical in an attempt to reduce the smoke. Plaintiff urges it has done everything that it could possibly do with the equipment it has to prevent the emission of smoke. It was shown on trial that the fleet is subject to periodic inspection by the coast guard, which issues a search of inspection.

The Crapo in 1955, docked at Detroit twenty-two times for an average docking time of 23.9 hours and the Boardman docked at Detroit 25 times that year with an average stay of 16.2 hours. Both vessels were constantly engaged in interstate and foreign commerce during this period.

Plaintiff claims that the smoke abatement ordinance is unconstitutional as to it except in those instances where the objectionable smoke is caused by improper firing or by the improper use of the equipment on the vessel.

HAS CONGRESS PRE-EMPTED THE FIELD?

Plaintiff argues that Congress has pre-empted the field through the enactment of elaborate and detailed regulations of steam vessels. *46 U. S. Code Annotated,* Sec. 932 Sup., provides that the coast guard shall inspect, before such vessels are put into service and at least once every two years thereafter, the boilers on unfired pressure vessels and appurtenances thereto; the propelling and auxiliary machinery, electrical apparatus and equipment of all vessels are subject to inspection.

It is argued that since Congress has validly enacted such statutes and regulations, a state or municipality may not pass a statute or ordinance covering the same field. *Kelly v. Washington,* 1937, 302 U. S. p. 1. Hand-fired scotch marine boilers have been approved by the coast guard. Smoke of the kind prohibited by the ordinance can not be avoided, hence the ordinance prohibits the use of a hand-fired scotch marine boiler.

The City, it urges, requires a certain kind of equipment to comply with its ordinance, other and different equipment than that which the Congress has provided may be used.

Reference is made also by analogy to the *Boiler Inspection Act*, Secs. 22-34 of Title 35, *U. S. Code Annotated*, relating to the inspection of railroad locomotives. *Napier v. Atlantic Coastline Railroad*, 1928, 272 U. S. 605.

The City, on the other hand, urges that the Congress has not enacted laws which provide for the protection of persons and property on land, including regulations of fuel and smoke-producing characteristics of equipment as a result of its use, and that, therefore, there is no conflict with federal regulations and the ordinance. There are devices and appliances which, if installed, would enable the plaintiff to comply, and this compliance may be required.

Under the Home Rule Act, M. S. A. 5.20732 and 5.2083, the police power of Detroit as a home rule city is of the same general scope and nature as that of the State and the ordinance is not directed, as are the federal regulations, to the protection of the vessels, its passengers, crew and freight. *Morgan v. Virginia*, 90 Law Ed. —, 165 A. L. R. 574. This is a case, it is urged, where Congress has not acted, and although the ordinance affects interstate commerce it is valid.

COURT'S HOLDING

The Court has reviewed the authorities cited in the excellent briefs of the parties, and it is our holding that the federal Congress has not pre-empted this particular field. The constitutional grant to Congress of the power to regulate interstate commerce, it has frequently been held, does not forestall all state action and does not prevent a state from legislating on a matter of local concern, even though interstate commerce may be indirectly and incidentally affected, provided the Congress has not seen fit to enact superseding legislation. *15 C. J. S.*, Commerce, Sec. 11, p.

268; *Cheboygan Lumber Co. v. Delta Transportation Co.*, 100 Mich. 16; *Burrows v. Delta Transportation Co.*, 106 Mich. 582; *Smith v. Alabama*, 124 U. S. 465; *Nashville, C. & St. Louis Railway Co. v. Alabama*, 128 U. S. 96, 177 U. S. 584; *H. P. Welch & Co. v. State of New Hampshire*, 306 U. S. 79.

These cases are constructions of statutes and ordinances affecting railroads and motor vehicles and are in point, the Court believes, as authority for the validity of the ordinance so far as the doctrine of federal pre-emption is concerned.

The language of the United States Supreme Court in the Welch case, which involved a New Hampshire statute declaring unlawful the operation on state highways of motor vehicles for specified transportation by drivers who have been continuously on duty for more than twelve hours, is persuasive.

It can not be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. In construing federal statutes enacted under the power conferred by the commerce law of the Constitution, it should never be held that Congress intends to supersede or suspend the exercise of the reserve powers of the state, even where that may be done, unless and except so far as its purpose to do so is clearly manifested.

Congress has not seen fit to regulate the emission of smoke by vessel in interstate commerce so far as such emission affects persons and property on land. Congress, therefore, has not pre-empted this particular field so as to exclude state regulation.

DOES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION ITSELF PRECLUDE THE ENACTMENT OF DETROIT'S SMOKE ABATEMENT ORDINANCE?

Plaintiff argues that a city other than Detroit could pass a smoke ordinance which would prohibit the use of even oil equipment, and other municipalities could pass even different and conflicting ordinances with which it would be impossible for plaintiff to comply. It is a field, therefore, it is urged, where uniformity is necessary in a constitutional sense in accomplishing a permitted purpose. *Morgan v. Virginia, supra.* Where uniformity is necessary, it is said, even though Congress has not acted, the Constitutional clause, or the power given by that clause to Congress, preempts or occupies the field and precludes a state or municipality from legislating in respect to anything requiring uniformity.

It would cost roughly $70,000 to equip either the Boardman or the Crapo with stokers, and at least $100,000 each to equip them with oil burning equipment. So the burden upon interstate commerce is very substantial and it is prohibitive if other cities pass conflicting or different ordinances. *Southern Pacific v. Arizona,* 1945, 325 U. S. 761; *Kelly v. Washington, supra.*

Plaintiff has cited a portion of the Supreme Court opinion in the Kelly case which represents a good statement of its position:

> "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, Congress may establish standards and designs for the structure and equipment of vessels,

and may prescribe rules for their operation, which could not properly be left to the diverse action of the States. The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on. But it does not follow that in all respects the state act must fall.

* * * * * *

"If, however, the State goes farther and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a particular matter goes too far must be left to be determined when the precise question arises."

Plaintiff urges that the congressional regulation of motor driven vessels is much less complete than that of a steam vessel; that even though the regulation of motor driven tugs was very incomplete, the Supreme Court indicated a state could not impose particular standards as to design, equipment and operation because those requirements, if imposed at all, must be through the action of Congress, which can establish a uniform rule.

The City of Detroit argues, on the other hand, that the smoke abatement code is not such a law as requires uniformity of regulation. Reference is made to Public Act 159, enacted by the Federal Congress in 1955, wherein it is provided in Section 1:

"That in recognition of the danger to public health and welfare, injury to agricultural crops and livestock, danger to, and danger of property and hazards to air and ground transportation, from air

> pollution, it is hereby declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the states and local governments in controlling air pollution."

Reference is also made to Volume 2, U. S. Code; *Congressional News*, 1955, pp. 2459 and 2461, states:

> "The bill does not propose any exercise of police power by the Federal Government and no provision in it invades the sovereignty of States, counties, or cities. There is no attempt to impose standards of purity.
>
> * * * * *
>
> "Moreover, unlike the water-pollution field in which a similar board now exists, instances of troublesome interstate air pollution are few in number and no federal legal control over interstate air pollution is currently proposed."

Reliance is placed upon *Atlantic Coastline Railroad v. Georgia*, 234 U. S. 290, construing a Georgia law requiring railroad locomotive operating on the main lines to be equipped with electric headlights of 300 watt power and to have reflectors of a certain dimension, wherein the Supreme Court stated in upholding the law said:

> "The requirements of a state, of course, must not be arbitrary or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state in the exercise of a similar power may not impose the same regulation."

Here a congressional Act had provided for locomotive brakes, ladders, grab irons and other safety requirements.

Reliance was similarly placed on certain motor vehicle cases; *Morris v. Duby*, 274 U. S. 135; *Maurer v. Hamilton*, 309 U. S. 598, as well as state regulations of seagoing vessels, *Kelly v. Washington, supra.*

Summarizing these cases the City argues that the Supreme Court will not hold a state or local law invalid because (1) different states would require different devices, or (2) the fact that a state may change the law requiring further changes in equipment, or (3) because the Federal Government has entered the field, unless the local law is proved to be in direct conflict with the federal regulations.

COURT'S HOLDING

The Court has reviewed the authorities cited by the parties and concludes that the constitutional control by the Federal Government of interstate commerce does not preclude a smoke abatement ordinance such as here involved where the Federal Congress has not seen fit to pass specific legislation calculated to protect property and persons on land, as opposed to regulations for the protection of crews and passengers as well as vessels and freight on vessels in interstate commerce,

While it is conceivable that uniformity of regulation through an act of Congress might be desirable, it is not a subject on which local authority may not legislate to meet local needs. It is readily conceivable that local situations require different and particular provisions depending upon the needs and the problems encountered by the local authorities.

The state regulatory measures upheld as to vessels in interstate commerce and as to railroads and motor vehicles in interstate commerce incline the Court to such a view: Smoke abatement does not, at this stage of scientific development, admit of only one system or plan of regulation but is a subject, it is believed, which requires diversity of treatment to meet local exigencies.

IS THE SMOKE ABATEMENT ORDINANCE A VALID EXERCISE BY THE CITY OF DETROIT OF ITS POLICE POWER?

It is well established that a considerable discretion is vested in legislative authority to determine not only what the interests of the public require but what measures are necessary for the protection of these interests. New subjects may be embraced within the police power as changing conditions require. *People v. Sell,* 310 Mich. 305, 316.

Considerable latitude is allowed for differences of view and possible peculiar conditions. *Safee v. City of Buffalo,* 198 N. Y. S. p. 649; *Cady v. City of Detroit, supra.*

> "The court is required, if it can consistently do so, to give to the provisions such a reasonable construction as will sustain it. It has no right to invade the legality province. Its power is confined to those cases in which a municipal ordinance is clearly and manifestly made to appear to be unreasonable or oppressive in its operation. (*Building Comm. v. Kunin,* 181 Mich. 611.)

The Court may concern itself only with the question of whether the legislative authority, assuming it has the power to enact a regulation, has so arbitrarily and capriciously exercised that power as to make the regulation unreasonable, in deprivation of the constitutional rights of the complaining parties. *Red Star Motor Drivers' Assn. v. Detroit,* 234 Mich. 398.

The emission of smoke has been subject to lawful regulations for many years. *People v. The Detroit White Lead Works, et al.,* 82 Mich. 471; *People v. Lewis,* 86 Mich. 273; *People v. Detroit, Belle Isle & Windsor Ferry Co.,* 187 Mich. 177.

The general subject matter having been regulated lawfully, the question here is whether the particular regulation, establishing a standard of proscribed smoke emission, namely, "density equal to or greater than the density of No. 2" of the Ringlemann Chart is permissible, and reasonably related to the purposes of the ordinance. This standard has been sustained in the State of New Jersey. *Atlantic City v. France*, 65 Atl. 894, affirmed, 70 Atl. 163. This case on appeal, however restated the old law that a common law nuisance must still be proved to convict under the ordinance.

The case of *Board of Health of Weehawken Twp. v. New York Central R. R. Co.*, 90 Atl. 2d, 729, recognized the proposition that it is not necessary to prove that air pollution results in a public nuisance in order to have it prohibited by ordinance, and upheld the standard of No. 2 of the Ringlemann Chart as a reasonable standard for proscribed smoke, even though the particular activity does not result in a public nuisance.

COURT'S HOLDING.

It is the view of this Court that the ordinance here, making unlawful the emission of smoke of a certain density is necessary and reasonable, and a valid exercise of local police power.

Scientific development in the field of smoke abatement, it is believed, has reached that point where a legislative authority may determine that smoke of a particular density should be prohibited in the interests of the safety, health and welfare of the general public. This exercise of legislative judgment should not be subject to judicial supervision unless plainly beyond the legitimate exercise of police power. We do not believe that Detroit's smoke

abatement ordinance is an arbitrary or unreasonable exercise of police power.

That conformity to the requirements established by the City will require the discontinuance by plaintiff of some of its present equipment does not render the ordinance constitutionally offensive. *People v. Consolidated Edison Co., of New York,* 116 N. Y. S. 2d, 555; *Northwestern Laundry v. Des Moines,* 239 U. S. 486, 60 Law Ed. 396; *Burrows v. Delta Transportation Co., supra.*

It is, therefore, held that Ordinance 167-E, of the City of Detroit is constitutional.

A permanent injunction is denied.

George E. Bowles,
Circuit Judge.

Dated: April 17, 1957.

APPENDIX "C"

IN THE SUPREME COURT OF MICHIGAN.

DECREE OF THE SUPREME COURT OF MICHIGAN

(Filed January 12, 1959)

This cause having been brought to this Court by appeal from the Circuit Court for the County of Wayne, in Chancery, and having been argued by counsel, and due deliberation had thereon, it is now ordered, adjudged and decreed by the Court, that the decree of the Circuit Court for the County of Wayne, in Chancery, be and the same is hereby in all things AFFIRMED. And it is further ordered, adjudged and decreed that no costs be awarded herein.

APPENDIX "D"

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE,
IN CHANCERY

DECREE AND ORDER DISMISSING BILL OF COMPLAINT

At a session of said Court held in the City-County Building in the City of Detroit, County of Wayne, State of Michigan, on May 1, 1957.

Present: Honorable George E. Bowles, Circuit Judge.

This cause having come on to be heard upon the bill of complaint and answer thereto and proofs taken therein in open Court and the matters in issue having been argued by counsel for the respective parties and the Court being fully advised in the premises, and the Court having filed an opinion which by reference is made a part hereof, finding that the plaintiff is not entitled to the relief prayed for in its bill of complaint and that Ordinance 167-E is constitutional.

Therefore, upon motion of the attorneys for defendants,

It is ordered, adjudged and decreed that the bill of complaint filed in said cause on behalf of plaintiff be dismissed and plaintiff's prayer for permanent injunction be denied, with costs to the defendants to be taxed.

George E. Bowles,
Circuit Judge.

A true Copy:
Edgar M. Branigin, Clerk.
By Barney Barthowiak, Deputy Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 86

HURON PORTLAND CEMENT COMPANY,
a Michigan corporation,
Appellant,
vs.
CITY OF DETROIT, a Michigan municipal corporation,
BENJAMIN LINSKY, Chief, Bureau of Smoke
Abatement, P. J. LAREAU,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE
OF MICHIGAN

BRIEF FOR THE APPELLANT

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Abatement, P. J. LAREAU,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF FOR THE APPELLANT

OPINION BELOW

The Opinion of the Supreme Court of Michigan (R. 28-34) is reported at 355 Mich. 227 and 93 N. W. 2d 888 (1959).

JURISDICTION

The decree of the Supreme Court of the State of Michigan was entered January 12, 1959 (R. 35). Notice of appeal to the Supreme Court of the United States was filed with the Clerk of the Circuit Court for the County of Wayne, Michigan (that being the court possessed of the record) on April 9, 1959 (R. 1). The jurisdictional statement was filed June 1, 1959. Probable jurisdiction was noted in this case on October 12, 1959 (R. 44). The jurisdiction of this Court rests on 28 U. S. C. 1257 (2).

CONSTITUTIONAL PROVISION, STATUTES AND ORDINANCE INVOLVED

Article I, Sec. 8, Clause 3 of the Federal Constitution grants to Congress the power: "To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;".

The statutes compiled under Title 46—Shipping—of the United States Code are involved. The more pertinent ones are: The first paragraph of 34 Stat. 68, 46 U. S. C. 362 (1952 ed.); R. S. 4401, 46 U. S. C. 364 (1952 ed.); 70 Stat. 223 (b), 46 U. S. C. 391 (1952 ed. Supp. V); 70 Stat. 224 (b) and (c), 46 U. S. C. 392 (1952 ed., Supp. V); 69 Stat. 86, 46 U. S. C. 399 (1952 ed., Supp. V); 53 Stat. 798, 46 U. S. C. 496 (1952 ed.); 49 Stat. 1367, 46 U. S. C. 263 (1952 ed.) These statutes are lengthy and their pertinent text is set forth in an appendix attached hereto.

Ordinance No. 163-E of the City of Detroit is affixed to page 37 of the record. The more pertinent provisions

of the ordinance, to wit, Sections 2.2A, 2.16, 2.17, 2.20, 2.21 and 3.2 are lengthy and are set forth in the appendix attached hereto.

QUESTIONS PRESENTED

1. Where Congress has provided for the inspection and licensing of vessels engaged in interstate commerce and appellant's vessels have been inspected by the United States Coast Guard and granted permission to navigate on the Great Lakes and have been enrolled and licensed by the Treasury Department of the United States to carry on coasting and foreign trade, is the smoke ordinance of the City of Detroit, Michigan valid as to said vessels, when it provides for the inspection of the boilers on the vessels and prohibits their use, and are the penalty provisions of said ordinance valid as to appellant's vessels when the prohibited smoke cannot always be prevented by the boilers inspected, approved and licensed by the United States?

2. Where the smoke ordinance of the City of Detroit, Michigan provides for the inspection of combustion equipment and prohibits use of certain kinds of boilers and equipment on vessels engaged in interstate and foreign commerce on the Great Lakes, and prohibits the emission of smoke which cannot be prevented at all times with boilers and equipment commonly used on the Great Lakes, does such ordinance unduly burden interstate and foreign commerce in matters where uniformity is necessary under the Commerce Clause of the United States Constitution, Article I, Section 8, Cl. 3?

STATEMENT

Appellant's fleet, which is engaged in interstate commerce, consists of four steamships and one motor vessel (R. 17, 29). It transports bulk cement from appellant's mill at Alpena, Michigan to its distributing plants located in various cities on the Great Lakes (R. 17). The four steamships are equipped with hand fired scotch marine boilers (R. 17).

These vessels are subject to inspection by the United States Coast Guard and the Certificate of Inspection as to S.S. S. T. Crapo was introduced in evidence as plaintiff's Exhibit 2 (R. 19, 38-41). This Certificate contains the following sentence: "The said vessel is permitted to be navigated for one year on the Great Lakes" (R. 39). The vessels are also enrolled with the Treasury Department of the United States Bureau of Customs. The Consolidated Certificate of Enrollment and License as to S.S. John W. Boardman was introduced as plaintiff's Exhibit A (See photostat opposite R. 42). This Certificate which is issued by the Bureau of Customs contains this license: "License is hereby granted for the said vessel to be employed in carrying on the COASTING AND FOREIGN TRADE for ONE YEAR from the date hereof, and no longer." It is conceded that Certificates of Inspection, like plaintiff's Exhibit 2, and Certificates of Enrollment and License, like plaintiff's Exhibit A, were issued for each vessel.

On December 20, 1955, two criminal cases were started in the Recorder's Court for the City of Detroit, Traffic and Ordinance Division. One case named appellant and the officers of S.S. John W. Boardman as defendants and the

other appellant and the officers of S.S. S.T. Crapo (R. 18). In these cases, it was charged that appellant and the other defendants had violated the criminal provisions of the smoke ordinance of the City of Detroit, in that the emission of smoke of the kind prohibited by the ordinance had been permitted for a period of nine or ten minutes on December 12, 1955 while the vessels were docked at the foot of Riopelle Street in the City of Detroit, Michigan (R. 18). This ordinance was introduced at the trial as plaintiff's Exhibit 5 and a copy of the same is attached to page 37 of the record.

Appellant filed a bill of complaint in the Circuit Court for the County of Wayne, Michigan, alleging that its fleet was engaged in interstate and foreign commerce and that the Constitution of the United States gave Congress full and complete authority and power to regulate such commerce and that Congress had enacted laws and regulations covering the construction, equipment and operations of vessels engaged in interstate commerce on the Great Lakes. The bill further alleged that appellant's vessels had been inspected and approved by the United States Coast Guard (R. 5). It was also alleged that it was necessary for its fleet to dock in the City of Detroit to unload cement and during that time full steam in the boilers had to be maintained and every four hours the fire under the boilers had to be cleaned. When a fire is cleaned it is impossible to prevent the emission of the kind of smoke prohibited by the Detroit smoke ordinance with the equipment which had been approved by the United States Coast Guard (R. 4, 18). Appellant sought to enjoin the prosecution of the two criminal cases and to enjoin the enforcement of the Detroit smoke ordinance against it unless the emission of the prohibited smoke is caused by improper firing or by the improper use of the equipment on said vessels (R. 7).

The S.S. S. T. Crapo docked at Detroit, in 1955, twenty-two times for an average docking time of 23.9 hours and S.S. John W. Boardman docked at Detroit, twenty-five times during that year, with an average stay of 16.2 hours (R. 19).

At the trial, it was conceded that the Detroit smoke ordinance could not be complied with at all times with hand fired scotch marine boilers (R. 18). It appeared that the smoke ordinance could be complied with if oil burning equipment or a well constructed underfeed stoker was installed on the vessels (R. 14-16). It would cost roughly $70,000 to equip either the S.S. John W. Boardman or the S.S. S. T. Crapo with an underfeed stoker and at least $100,000 each to equip them with oil burning equipment (R. 22).

The trial court filed a written opinion (R. 16-26) and a decree was entered dismissing the bill of complaint (R. 27). On appeal to the Supreme Court of Michigan, the decree entered in the trial court was affirmed (R. 28-34,.35).

SUMMARY OF ARGUMENT

1. Inasmuch as appellant's vessels and their equipment have been inspected, approved and licensed by the United States Coast Guard under authority from Congress, the Detroit smoke ordinance may not require the inspection and approval of the same equipment or impose criminal penalties for the emission of smoke which cannot at all times be avoided by vessels having equipment inspected and licensed by the United States Coast Guard.

2. The Commerce Clause of the United States Constitution in and of itself pre-empts the field where uniformity

is necessary and, therefore, the Detroit Smoke Ordinance may not validly be applied to vessels engaged in interstate commerce because it materially burdens such commerce where uniformity is necessary.

ARGUMENT

I.

WHERE CONGRESS HAS PROVIDED FOR THE INSPECTION AND LICENSING OF STEAMSHIPS, A CITY MAY NOT APPLY ITS SMOKE ORDINANCE TO SUCH STEAMSHIPS WHERE THE ORDINANCE IN EFFECT PROHIBITS THE USE OF THE EQUIPMENT ON SUCH STEAMSHIPS.

Article I, Sec. 8, Clause 3, of the Federal Constitution gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;".

Under this provision, Congress has enacted laws concerning steamships engaged in navigation and these laws are applicable to the Great Lakes. These statutes are compiled in Title 46 U. S. C.

Kelly v. Washington, 302 U. S. 1, 4 (1937). With reference to these acts, the Court said:

> "The federal acts and regulations with respect to vessels on the navigable waters of the United States are elaborate. They are well described in the argument of the Assistant Solicitor General as a maze of regulation. Provisions with respect to steam vessels are extremely detailed. 46 U. S. C. c 14, Sec. 361 *et seq.*"

70 Stat. 224 (b), 46 U. S. C. 392 (b) (1952 ed., Supp. V) provides that the Coast Guard is to inspect at least once

every two years the boilers, unfired pressure vessels and appurtenances thereof of all vessels other than passenger vessels. Subsection (c) provides that the Coast Guard is to determine to its satisfaction that the boilers, unfired pressure vessels and equipment may be safely employed in the service proposed. There is also contained in this section this sentence: "No boiler, unfired pressure vessel, or appurtenance thereof shall be allowed to be used if constructed in whole or in part of defective material or which because of its form, design, workmanship, age, use or for any other reason is unsafe" (App. 1a, 2a).

69 Stat. 86, 46 U. S. C. 399 (1952 ed., Supp. V) provides that when the inspection of a steam vessel is completed and the Coast Guard approves the vessel and *her equipment throughout*, a certificate to that effect shall be made (App. 3a). Plaintiff's Exhibit 2 (R. 38-41) is this certificate and after describing the boiler and other equipment, provides: "The said vessel is permitted to be navigated for one year on the Great Lakes" (R. 39). In accordance with 49 Stat. 1367, 46 U. S. C. 263 (1952 ed.) (App. 4a), plaintiff's Ex. A was issued (See photostat opposite R. 42). This exhibit is a consolidated certificate of enrolment and license and it includes the following:

> "LICENSE is hereby granted for the said vessel to be employed in carrying on the COASTING AND FOREIGN TRADE for ONE YEAR from the date hereof, and no longer."

Gibbons v. Ogden, 9 Wheat. 1, 213 (1824):

> "The word 'license' means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfer to him all

the rights which the grantor can transfer, to do what is within the terms of the license."

Admittedly, Congress, under the Commerce Clause has authority to control interstate commerce and the two licenses, above referred to, under *Gibbons* transfer to appellant's vessels the right to navigate the Great Lakes. The licenses include the right to use the vessels as equipped when inspected and when enrolled.

Section 2.2A of the Detroit smoke ordinance prohibits the emission of the kind of smoke which cannot be at all times prevented by vessels equipped with hand fired scotch marine boilers (App. 5a) (R. 18). Sec. 2.16 of the ordinance makes it unlawful to use any furnace or other combustion equipment or device in the city without a certificate of operation which issues only after inspection (App. 6a). Sec. 2.17, with exceptions not important here, provides for an annual inspection of every furnace or other combustion equipment used within the city (App. 6a). Under Sec. 2.20, if an owner has been previously notified of three or more violations of the ordinance within any consecutive twelve month period, such owner shall be notified to show cause before the Commissioner why the equipment should not be sealed. At the hearing, if the Commissioner finds that adequate corrective means have not been employed to remedy the situation, the equipment shall be sealed (App. 6a). Sec. 3.2 provides for a fine of $100.00 or imprisonment of not more than 30 days upon conviction of violation of any provision of the ordinance and that each day a violation is permitted to exist shall constitute a separate offense (App. 7a).

Thus, the ordinance requires the inspection and approval of the equipment which has been inspected and approved by the United States Coast Guard. The ordinance also

provides for the sealing of the equipment, if the owner is notified of three or more violations within a year, notwithstanding the fact that it has been approved by the Coast Guard under authority of Congress. The ordinance also provides for fine and imprisonment for violations of the ordinance which cannot be avoided through the use of equipment expressly approved and licensed by the federal government.

Kelly v. Washington, 302 U. S. 1, 4 (1937). Here the Court was discussing statutes of the State of Washington concerning the inspection of motor tugs and said:

> "The first question is whether the state legislation as applied to respondents' motor-driven tugs is in all respects in conflict with express provisions of the federal laws and regulations." Wherever such conflict exists, the state legislation must fall. *Gibbons v. Ogden*, 9 Wheat. 1, 210."

Appellant submits that the Detroit smoke ordinance is in conflict with the express provisions of the federal laws and regulations in that both provide for the inspection of the same equipment, to wit, the hand fired scotch marine boiler. Further, a certificate of operation would not issue under the ordinance for a scotch marine boiler and, therefore, such a boiler could not be used, although it had been inspected and approved by the United States Coast Guard. Further, the smoke ordinance contains criminal provisions for its violation which cannot at all times be avoided by vessels equipped with hand fired scotch marine boilers (R. 18). Thus, the use of equipment which is approved and licensed by the federal government for navigation on the Great Lakes could cause appellant and the officers of its vessels to be guilty of violating the ordinance.

It probably will be argued, that the Detroit ordinance is aimed at the prevention of air pollution and not at any

regulation of interstate commerce and that it affects interstate commerce, if at all, only indirectly and incidentally. Such an argument completely ignores the facts. It is true that the City of Detroit is not directly seeking to regulate interstate commerce, but the ordinance does so when the same can only be complied with through the use of certain equipment upon vessels engaged in interstate commerce. The city is, by indirection, saying that only certain equipment may be used in interstate commerce, thus preventing the use of other equipment. As Congress has already provided for the inspection of this equipment, there is a direct conflict between the acts of Congress and the Detroit ordinance. This conflict is emphasized when it is realized that equipment which the Coast Guard has inspected and *approved throughout* may not be used in Detroit and its use may bring appellant within the penal provisions of the ordinance.

The Boiler Inspection Act, Sections 22-34 of Title 45, U. S. C. provides for the inspection of railroad locomotives. It is not too dissimilar from the acts governing the inspection of steamships. Under the Boiler Inspection Act, the Court has had the problem of determining conflicts between state statutes and that Act. In that case, we believe the conflict was much less direct than in our case, for there the state statutes merely required the addition of certain equipment, but such statutes were held invalid because they and the Boiler Inspection Act were directed to the same subject, to wit, the equipment of locomotives. Here we have the ordinance prohibiting the use of the *particular equipment* which has been in all respects approved by the federal government.

Napier v. Atlantic Coast Line Railroad, 272 U. S. 605, 612 (1926). In Georgia a statute was passed requiring automatic fire doors on locomotives and in Wisconsin an-

other statute was passed requiring cab curtains during the winter. The Court held that both of these statutes were void even if the Interstate Commerce Commission had made no order requiring a particular type of fire door or cab curtain, holding that the Boiler Inspection Act conferred upon the Interstate Commerce Commission the exclusive power to specify the sort of equipment to be used on locomotives.

The Court said:

> "Did Congress intend that there might still be state regulation of locomotives, if the measures were directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?
>
> The federal and state statutes are directed to the same subject—*the equipment of locomotives.* They operate upon the same object. It is suggested that the power delegated to the Commissioner has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic fire box door and cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standards set by the Commission must prevail, requirements of the states are precluded, *however commendable or however different their purpose.*" (Emphasis added.)

Hill v. Florida, 325 U. S. 538, 542 (1945):

> "But here, this agent has been enjoined, and if the Florida law is valid he could be found guilty of a contempt of doing that which the act of Congress permits him to do. Furthermore, he could, under Section 14 of the state law, be convicted of a misdemeanor and subjected to fine and imprisonment. The collective bargaining which Congress has authorized contemplates two parties free to bargain and cannot thus be frustrated by state legislation. We hold that Section 4 of the Florida Act is repugnant to the National Labor Relations Act."

Service Storage and Transfer Co. v. Virginia, 359 U. S. 171, 176 (1959). Petitioner had been granted a certificate by the Interstate Commerce Commission to engage as a motor carrier between certain points. Freight from and to points in Virginia was routed through West Virginia. Virginia claimed that this was a sham and, that, the petitioner was guilty of engaging in intrastate freight business without permission and fined the petitioner $3,500. Held:

> "To uphold the criminal fine here assessed would be tantamount to a partial suspension of petitioner's federally granted certificate."

We submit that if the Detroit smoke ordinance is applicable to vessels engaged in interstate commerce, compliance with such ordinance necessarily dictates the equipment which must be used upon such vessels and, therefore, intrudes upon a field pre-empted by Congress.

II.

IF CONGRESS HAS NOT EXPRESSLY PRE-EMPTED THE FIELD, THE DETROIT SMOKE ORDINANCE MATERIALLY AFFECTS INTERSTATE COMMERCE IN MATTERS WHERE UNIFORMITY IS NECESSARY.

If the Detroit smoke ordinance may be validly applied to vessels engaged in interstate commerce, other cities, villages and hamlets on the Great Lakes could pass different and varying smoke ordinances. One city could pass an ordinance which couldn't be complied with even though the vessel had a properly installed underfeed stoker. Another city might pass a smoke ordinance which couldn't be complied with even if the vessel had oil burning equipment. This argument is not absurd because in *People v. Cunard White Star, Ltd.*, 280 N. Y. 413, 21 N. E. 2d 489 (1939), the Queen Mary was found guilty of violating a smoke ordinance of the City of New York by a lower court, even though the Queen Mary had oil burning equipment.

It is not a valid argument to say that if a vessel has equipment which will comply with the most severe smoke ordinance, that the vessel is, therefore, safe, because in the future an ordinance might be enacted which would require higher standards. It does not necessarily follow that a smoke ordinance would be unconstitutional even if it could not be complied with by a vessel with the best equipment. Then, too, courts of the various states might differ on whether a smoke ordinance is reasonable or unreasonable. It follows that if compliance with an ordinance is inseparably connected with the kind of equipment on a vessel, such ordinance affects interstate commerce where uniformity is required.

The effect of the Detroit ordinance on interstate commerce is material. In this case it would cost roughly $70,000 to equip each of the appellant's vessels with an underfeed stoker, and at least $100,000 to equip each vessel with oil burning equipment (R. 22). The cost is extremely material, and when that is multiplied by the number of vessels engaged in interstate commerce on the Great Lakes equipped with hand fired scotch marine boilers, the cost becomes fantastic. A city could pass a smoke ordinance which could be complied with only if some very different form of equipment is used and the cost of which cannot even be estimated.

In the Supreme Court of Michigan, in this case, there were several *amicus curiae* briefs filed. One was filed on behalf of Lake Carriers' Association. In this brief, it was stated in a footnote: "At the close of the 1957 navigation season the combined Canadian (282 vessels) and United States (415 vessels) Great Lakes commercial fleet totaled 697 vessels, including car ferries and passenger steamers. While the accurate figures are not available, it is estimated that of the total fleet, 463 burned coal for fuel, 277 being hand fired, of which 256 have hand fired scotch marine boilers. Undoubtedly, a great many of these vessels dock at Detroit or pass through waters within the boundary of the City of Detroit, to-wit, the Detroit River."

Morgan v. Virginia, 328 U. S. 373, 377 (1946). The provisions of the Virginia Code required separation of white and colored passengers on both interstate and intrastate motor carriers. The claim was made that this statute burdened interstate commerce, contrary to the Commerce Clause, even though Congress had enacted no legislation on the subject. The state claimed thaet this statute was

passed under the police power to avoid friction between the races. The Court said:

> "The precise degree of a permissible restriction on state power cannot be fixed generally or indeed not even for one kind of state legislation, such as taxation or health or safety. There is a recognized abstract principle, however, that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress is beyond state power. This is that the state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation * * *."

P. 378:

> "In the field of transportation, there has been a series of decisions which hold that where Congress has not acted and although the state statute affects interstate commerce, a state may validly enact legislation which has predominantly only a local influence on the course of commerce. It is equally well settled that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce."

Southern Pacific Co. v. Arizona, 325 U. S. 761, 773 (1945). Arizona limited passenger trains to 14 cars, freight trains to 70 cars.

> "Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application."

P. 775:

> "If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation. The practical effect of such regulation is to control train operations beyond the boundaries of the state enacting it because of the necessity of breaking up and reassembling long trains at the nearest terminal points before entering and after leaving the regulating state. The serious impediment to the free flow of commerce by the local regulation of train lengths and the practical necessity that such regulation, if any, must be prescribed by a single body having a nation-wide authority are apparent."

Kelly v. Washington, 302 U. S. 1, 14 (1937):

> "*Third.* The remaining question is whether the state law must fall in its entirety, not because of inconsistency with federal action, but because the subject is one as to which uniformity of regulation is required and hence, whether or not Congress has acted, the State is without authority. *Cooley v. Board of Wardens*, 12 How. 299, 319; *Minnesota Rate Cases*, 230 U. S. 352, 399, 400.
>
> "The state law is a comprehensive code. While it excepts vessels which are subject to inspection under the laws of the United States, it has provisions which may be deemed to fall within the class of regulations which Congress alone can provide. For example, *Congress may establish standards and designs for the structure and equipment of vessels, and may prescribe rules for their operation, which could not properly be left to the diverse action of the States.* The State of Washington might prescribe standards, designs, equipment and rules of one sort, Oregon another, California another, and so on." (Emphasis added.)

Freeman v. Hewit, 329 U. S. 249, 252 (1946). This case involves the Indiana Gross Income Tax Act of 1933. The Court said:

> "Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co. v. Arizona*, 325 U. S. 761; *Morgan v. Virginia*, 328 U. S. 373. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables."

The operating equipment on vessels, its manufacture, design and characteristics is extremely important to navigation. If every state, city, village or hamlet may inspect such equipment and decree that only equipment meeting its requirement may be used, navigation will soon cease.

It is respectfully submitted that the Detroit smoke ordinance materially burdens interstate commerce in matters where uniformity is necessary and, therefore, may not be validly applied to appellan's vessels.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decree of the court below should be reversed and that the Detroit smoke ordinance be held unconstitutional as to appellant's vessels, except where the prohibited smoke is caused by improper firing or by the improper use of the equipment upon said vessels.

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January 15th, 1960.

APPENDIX

34 Stat. 68, 46 U. S. C. 362 (1952 ed.). The first paragraph is as follows:

> All steam vessels navigating any waters of the United States which are common highways of commerce or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of title 52 of the Revised Statutes.

R. S. 4401, 46 U. S. C. 364 (1952 ed.) is as follows:

> All coastwise seagoing vessels, and vessels navigating the Great Lakes, shall be subject to the navigations laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, as provided by this Title; and every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the Coast Guard.

70 Stat. 223, 46 U. S. C. 391 (1952 ed., Supp. V) is as follows:

> (b) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every two years there-

after, the hull of each steam vessel, not carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in a condition to warrant the belief that she may be used in navigation, with safety to life, and that the vessel is in full compliance with the applicable requirements of this title or Acts amendatory or supplementary thereto and regulations thereunder; and if deemed expedient, to direct the vessel to be put in motion or to adopt any other suitable means to test her sufficiency and that of her equipment.

70 Stat. 224, 46 U. S. C. 392 (1952 ed., Supp. V) provides as follows:

(b) The head of the department in which the Coast Guard is operating also shall require the Coast Guard to inspect, before the same shall be put into service and at least once in every two years thereafter, the boilers, unfired pressure vessels, and appurtenances thereof, also the propelling and auxiliary machinery, electrical apparatus and equipment, of all vessels subject to inspection other than passenger vessels.

(c) The head of the department in which the Coast Guard is operating shall require the Coast Guard to determine to its satisfaction by thorough examination that the boilers, unfired pressure vessels, and appurtenances thereof, also the propelling and auxiliary machinery, electrical apparatus and equipment of all vessels which are subject to inspection under subsections (a) and (b) herein are in conformity with law and the rules and regulations of the head of the department in which the Coast Guard is operating, and may be safely employed in the service proposed. No boiler, unfired pressure vessel, or appurtenances thereof shall be allowed to

be used if constructed in whole or in part of defective material or which because of its form, design, workmanship, age, use, or for any other reason is unsafe.

69 Stat. 86, 46 U. S. C. 399 (1952 ed., Supp. V), provides in part as follows:

> When the inspection of a steam vessel is completed and the Secretary of the Department in which the Coast Guard is operating approves the vessel and her equipment throughout, he shall make and subscribe a certificate to that effect. He shall deliver such certificate to the master or owner of the vessel to which it relates, shall keep one copy thereof on file in his office, and shall deliver one copy to the official who is performing the duties of the collector or other chief officer of the customs of the district in which such inspection has been made, who shall keep the same on file in his office.

53 Stat. 798, 46 U. S. C. 496 (1952 ed.) is as follows:

> A register, enrollment, or license shall not be granted, or other papers be issued by any collector or other chief officer of customs to any vessel subject by law to inspection under this title (R. S. 4399-4500) until all the provisions of such title applicable to such vessel have been fully complied with and until the copy of the certificate of inspection required by such title for such vessel has been filed with said collector or other chief officer of customs: *Provided*, That the license granted to any vessel, if presented to any collector of customs at any time within thirty calendar days prior to the date of expiration shown thereon, may be renewed by the endorsement by the collector of customs for a period of one year from the date of expiration shown on the license, if there be on file in the office of the collector at that time a copy of the certificate of inspection required by title 52 of the Revised Statutes, which is in force on the date renewal is made.

49 Stat. 1367, 46 U. S. C. 263 (1952 ed.) is as follows:

The form of a license for carrying on the coasting trade or fisheries shall be as follows:

"License for carrying on the (here insert 'coasting trade', 'whale fishery', 'mackerel fishery', or 'cod fishery', as the case may be).

"In pursuance of Title L (R. S. 4311-4390), 'Regulation of Vessels in Domestic Commerce', of the Revised Statutes of the United States, (inserting here the name of the husband or managing owner, with his occupation and place of abode, and the name of the master, with the place of his abode), having sworn that the (insert here the description of the vessel, whether ship, brigantine, scow, schooner, sloop, or whatever else she may be); called the (insert here the vessel's name), whereof the said (naming the master) is master, burden (insert here the number of tons, in words) tons, as appears by her enrollment, dated at (naming the district, day, month, and year, in words at length, but if she be less than twenty tons, insert, instead thereof, 'proof being had of her admeasurement'), shall not be employed in any trade, while this license shall continue in force, whereby the revenue of the United States shall be defrauded, and having also sworn (or affirmed) that this license shall not be used for any other vessel, or for any other employment, than is herein specified, license is hereby granted for the said (inserting here the description of the vessel) called the (inserting here the vessel's name), to be employed in carrying on the (inserting here 'coasting trade', 'whale fishery', 'mackerel fishery', or 'cod fishery', as the case may be), for one year from the date hereof, and no longer. Given under my hand and seal, at (naming the said district), this (inserting the particular day) day of (naming the month), in the year (specifying the number of the year in words at length);": *Provided,* That vessels

of five net tons and over entitled under the laws of the United States to be enrolled and licensed or licensed for the coasting trade may be licensed for the 'coasting trade and mackerel fishery', and shall be deemed to have sufficient license for engaging in the coasting trade and the taking of fish of every description, including shellfish: *Provided further*, That the provisions of sections 310 and 311 of this title shall be, and are made applicable to vessels so licensed: *And provided further*, That vessels operating on the Great Lakes and their connecting and tributary waters under enrollment and license issued in conformity with the provisions of section 258 of this title, shall be deemed to have sufficient license for engaging in the taking of fish of every description within such waters without change in the form of enrollment and license prescribed under the authority of that section.

SMOKE ORDINANCE

Section 2.2A:

It shall be unlawful within the City of Detroit for any person, firm or corporation to permit the emission of any smoke from any source whatever of a density equal to or greater than that density described as No 2 of the Ringlemann Chart; Provided, That the following exceptions to the provisions of this section shall be permitted:

(a) Smoke, the shade or appearance of which is equal to but not darker than No. 2 of the Ringlemann Chart for a period, or periods, aggregating four minutes in any 30 minutes;

(b) Smoke, the shade or appearance of which is equal to but not darker than No. 3 of the Ringlemann Chart for a period, or periods, aggregating three minutes in any 15 minutes, when building a

new fire or when breakdown of equipment occurs such as to make it evident that the emission was not reasonably preventable.

Section 2.16:

It shall be unlawful for any person, firm or corporation to use or operate any furnace or other combustion equipment or device which is subject to annual inspection, as hereinafter set forth, without a certificate of operation; provided, however, that if application for such certificate of operation has been made and the required inspection fee paid, it shall be lawful to use such furnace or other fuel-burning equipment or device until receipt of such certificate or until notification by the Bureau of its refusal to grant such certificate.

Section 2.17:

Every furnace or other combustion equipment or device shall be inspected annually and a report and permanent record made of such inspection by the Bureau except the following:

(1) Furnaces or other combustion equipment or devices installed to heat buildings used exclusively for private residences containing less than three dwelling units or flats, and

(2) Combusion equipment or devices used exclusively for private residences which do not contain a central heating plant.

Section 2.20:

After any owner, agent, occupant, manager or lessee of any premises has been previously notified of three or more violations of this Ordinance within any consecutive 12-month period; in respect to the emission of smoke, soot, cinders, noxious acids, fumes, gases, fly ash or industrial dusts, the owner,

agent, occupant, manager or lessee of said premises shall be notified to show cause before the Commissioner not less than ten days from the date of notice, why the equipment causing such violation should not be sealed.

(a) The notice herein provided for may be given by mail directed to the last known address of the party to be notified, or if said party or his whereabouts is unknown, then by posting a notice on or near the premises at which the violations shall have occurred. Upon said date said violator may appear and be heard. Upon such hearing, if the Commissioner finds that adequate corrective means and methods have not been employed to correct the cause of such condition then it shall be his duty to seal said equipment until such time as a permit and certificate as herein provided have been applied for and issued for said plant.

(b) It shall be unlawful for any person to break a seal of any refuse burning equipment, any boiler or any equipment or device producing heat or power, that has been duly sealed by the Commissioner or his authorized representative.

Section 2.21:

When a certificate of operation is refused in the case of an original inspection or a case of an annual inspection, the Commissioner is authorized to seal, immediately, the furnace or other combustion equipment until the owner, lessee or other person required to procure the certificate of operation shall have complied with the provisions of this Ordinance.

Section 3.2:

Any person, persons, firm, partnership, association or corporation or any one acting in behalf of said person, persons, firm, partnership, association or corporation violating any of the provisions of

this Ordinance shall upon conviction thereof be subject to a fine of not more than one hundred dollars ($100.00) or to imprisonment in the Detroit House of Correction for a period of not more than thirty (30) days, or to both such fine and imprisonment in the discretion of the court. Each day that a violation of this Ordinance is continued or permitted to exist without compliance shall constitute a separate offense punishable upon conviction in the manner prescribed in this section.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 86

HURON PORTLAND CEMENT COMPANY,
a Michigan corporation,
Appellant,
vs.
CITY OF DETROIT, a Michigan municipal corporation,
BENJAMIN LINSKY, Chief, Bureau of Smoke
Abatement, P. J. LAREAU,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE
OF MICHIGAN

BRIEF FOR THE APPELLEES

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action was pending before the Pennsylvania Court, the Interstate Commerce Commission, acting under the Motor Carrier Act of 1935, issued a report which, in effect, said that motor carriers carrying another vehicle over the cab or head of the driver of the carrier vehicle was just as safe as other highway trucks and, therefore, permitted under existing Interstate Commerce Commission regulations. The United States Supreme Court, in the face of the Interstate Commerce Commission's findings, upheld the Pennsylvania Act and said:

> "As a matter of statutory construction, congressional intention to displace the local laws in the exercise of its commerce powers is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose. *This is especially the case when public health and safety are concerned.*" (Emphasis supplied.)

In the case of *H. P. Welch Company v. State of New Hampshire*, 306 U. S. 79-85, 59 S. Ct. 438, 83 L. ed. 500, the plaintiff was appealing from a judgment of the Supreme Court of the State of New Hampshire dismissing an appeal from an order of the State Highway Commission suspending the registration certificate of an interstate motor vehicle carrier for violation of a state statute declaring unlawful the operation, on state highways, of motor vehicles for specified transportation, by drivers who have been continuously on duty for more than twelve hours. The court in its opinion said:

> "There is need of local supervision of operation of motor vehicles to prevent collisions, to safeguard pedestrians, and the like. Unquestionably, reasonable regulation of periods of continuous driving is an appropriate measure. In view of the efforts of governmental authorities everywhere to mitigate

> the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed. *Mintz v. Baldwin*, 289 U. S. 346, 350, 77 L. ed. 1245, 1249, 53 S. Ct. 611. The rule applicable is clearly stated in *Illinois C. R. Co. v. State Pub. Utilities Commission*, 245 U. S. 493, 510, 62 L. ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918C, 279: • • • Plainly Congress by mere grant of power to the Interstate Commerce Commission did not intend to supersede state police regulations established for the protection of the public using state highways." (83 L. ed. 505.)

In the case of *Kelly v. Washington*, 302 U. S. 1, 82 L. ed. 3, 58 S. Ct. 87, also cited and relied upon by plaintiff, the respondent was the owner and operator of a large number of tug boats that were licensed under Federal Law. For the most part the tugs were employed only in intrastate commerce; however, some of the boats were utilized in interstate commerce.

The respondents, in attempting to prohibit the enforcement of a statute of the State of Washington providing for the hull and machinery inspection of the type of tugs owned by respondents, urged that the statute was invalid because Congress had pre-empted the field by enacting legislation requiring the inspection of vessels engaged in interstate commerce. Also, it was contended that if the Federal Government had not completely occupied the field of regulation with which the local law was concerned, the state statute was, nevertheless, in contravention of the Commerce Clause, i. e., Art. I, Section 8, Clause 3 of the Constitution of the United States, because the local inspections imposed an unreasonable burden upon interstate commerce in an area where uniformity of regulation was necessary.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 86

HURON PORTLAND CEMENT COMPANY,
a Michigan corporation,
Appellant,
vs.
CITY OF DETROIT, a Michigan municipal corporation,
BENJAMIN LINSKY, Chief, Bureau of Smoke
Abatement, P. J. LAREAU,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE
OF MICHIGAN

BRIEF FOR THE APPELLEES

STATEMENT

The City of Detroit adopted Ordinance 167-E, as amended, on October 16, 1947 (Pl.'s Ex. 5, R. 37). On December 16, 1955, the appellant was complained against in the Recorder's Court of the City of Detroit for allowing the emission of dense black smoke in violation of Section 2.2a of Ordinance 167-E (R. 37). The appellant subse-

quently filed a Bill of Complaint asking that the City of Detroit be enjoined from prosecuting and alleging that he was engaged in interstate commerce and the ships in question which had emitted the dense smoke had been approved by the United States Coast Guard and as a result of such inspection could not be regulated by the City of Detroit because the Congress of the United States, in adopting the various navigation and steamship laws, had pre-empted the field (R. 3-7). At the trial of the above-entitled cause, the defendant City of Detroit introduced unrebutted testimony that there was equipment that was available that could be installed on appellant's ships that would comply with the number one objective of the International Joint Commission and the Smoke Abatement Code of the City of Detroit (R. 14-16).

SUMMARY OF ARGUMENT

The Smoke Abatement Code of the City of Detroit is a reasonable ordinance needed to protect the health and welfare of the people of the City of Detroit; that the Congress of the United States, in adopting the regulations which control steamships of the United States, had no intention of superseding air pollution ordinances of the various cities of the United States and, more specifically, the Smoke Abatement Code of the City of Detroit; that there is no conflict between the United States regulation of steamships and the City Code; that the regulation of air pollution is for the benefit of those residing in the community where such a regulation has been adopted, and the regulation of steamships is for the safety of the crews, freight, and passengers of such ships; that air pollution does not admit of only one plan but, to the contrary, there must be a diversity of treatment to meet the needs of each community. Uni-

formity of regulation is not necessary and not desirable because such regulation is in no way burdensome to interstate commerce.

No claim is made that the City of Detroit has ever made an annual inspection or required a license of ships engaged in interstate or intrastate commerce, nor does the appellant claim in his Bill of Complaint (R. 3-7) that he was required to have a license or required to undergo an annual inspection.

ARGUMENT

I.

WHERE CONGRESS HAS PROVIDED FOR THE INSPECTION AND LICENSING OF STEAMSHIPS, A CITY MAY NOT APPLY ITS SMOKE ORDINANCE TO SUCH STEAMSHIPS WHERE THE ORDINANCE IN EFFECT PROHIBITS THE USE OF THE EQUIPMENT ON SUCH STEAMSHIPS.

The Common Council of the City of Detroit, knowing that excessive air pollution had become detrimental to the health and welfare of its citizens, adopted Ordinance 167-E, the official Smoke Abatement Code of the City of Detroit. The preamble to the Code is as follows:

> "Whereas, the excessive emission of dense smoke within the corporate limits of the City of Detroit and the resultant effect upon the public health and welfare require the adoption of a comprehensive and integrated plan of smoke control; and
>
> "Whereas, in conjunction with the smoke control program it is desirable to adopt appropriate regulations to reduce air pollution caused by excessive soot, cinders, fly ash, dust, noxious acids, fumes and gases, the emission of which is detrimental to the

health and welfare of the residents of the City: Now, Therefore,"

The complete Federal regulations for steamships which were first enacted by Congress in 1871 are now contained in Chapter 14, Title 46 USCA. In the case of *Ace Waterways, Inc., v. Fleming*, 98 F. Supp. 666 (1951), the Court, in construing the above Federal regulations, said in part, at p. 667:

> "The statutory scheme for the inspection of vessels is found in the Revised Statutes. More recently these provisions have been compiled in Chapter 14 of Title 46 of the United States Code Annotated. The various sections of Chapter 14 of Title 46 impose certain requirements in respect to the inspection and regulation of vessels, the purpose being largely to protect life and property."

And at p. 668, the court said as follows:

> "Section 391; which is a part of Chapter 14 of Title 46 of United States Code, Annotated, imposes the duty on the Coast Guard of inspecting the hull of every vessel once every year and of satisfying itself that every such vessel is in a condition to warrant the belief that she may be used in navigation with safety to life, and that all the requirements of law in regard to fires, boats, life preservers, etc., are faithfully complied with. Section 481 requires every vessel to be provided with such number of lifeboats as will best secure the safety of all persons on board such vessel in case of disaster. The Commandant of the Coast Guard is authorized to fix and determine by rules and regulations the character of lifeboats and similar equipment to be used on such vessels. (App. 1b.)
>
> "The statutes in question being intended to protect the safety of life and property and to minimize

disaster at sea, should receive a liberal construction in the public interest."

The Supreme Court of the State of Michigan in 1894 in the case of *Cheboygan Lumber Company v. Delta Transportation Co.*, 100 Mich. 16, in construing the original federal regulation of steam vessels, specifically Chapters 1 and 2 of Title 52, Revised Statutes, Sec. 4400, said:

> "It is manifest that the purpose of the United States statute is the protection of the boat, its passengers, crew, and freight. None of the provisions of the law show any intent to legislate upon, or provide for, the protection of persons and property on land. If we look to the regulations adopted by the board of inspectors, the same purpose is manifest."

It is apparent that the municipal smoke ordinance of the City of Detroit, Ordinance 167-E, is concerned with the regulation of smoke that is emitted from the chimney or stack, while the Federal navigation laws, under which the plaintiff and appellant herein asserts immunity from prosecution, embrace only such regulations as would protect steam vessels and the passengers, crews, and freight of such vessels. Therefore, it would conclusively appear that the Congress of the United States and the Common Council of the City of Detroit were legislating for different purposes and on different subject matters when they adopted the two regulations in question.

The appellant, Huron Portland Cement Company, on page 13 of its brief states that the Detroit Ordinance necessarily dictates the equipment which must be used upon such vessels and, therefore, intrudes upon a field pre-empted by Congress.

In considering the question of pre-emption, the general rule is properly stated in *11 Am. Jur., Commerce* §24:

> "• • • However, the intention of Congress to supersede or exclude state action is not lightly to be inferred. In order for an act of Congress to supersede a state statute, the repugnance or conflict must be direct and positive, so that the two acts cannot be reconciled or consistently stand together, or, at least, Congress must have manifested a purpose to exercise its paramount authority over the subject. Congressional regulation of a business does not nullify state regulation of the same business, if the Federal act does not cover the same field or is consistent with the state legislation or if Congress has so circumscribed its regulation as to leave part of the subject open to state action. It is only where there is an actual and distinct conflict that the state law will be displaced and then only as to that part of the state law in actual conflict with the Federal law."

Very early in the judicial history of this country the United States Supreme Court determined that the states under their police power had the authority to adopt regulations in matters which were of local concern even though in some measure affect interstate commerce and also regulate interstate commerce. *Cooley v. Port Wardens*, 12 How. (U. S.) 299, 13 L. ed. 996.

The courts have gone to great lengths to allow the states and municipalities the right to regulate interstate commerce to protect the health, safety and welfare of its citizens.

The question as to whether a particular Federal Act precludes any action by a state in the same field has been before this court many times, the general rule being that a state law enacted under any of the reserved powers • • • especially if under the police power • • • is not to be set aside as inconsistent with an act of Congress unless there is actual repugnancy, or unless Congress has at least mani-

fested a purpose to exercise its paramount authority and the intent to supersede the exercise by the state of its police power, as to matters not covered by the Federal legislation, is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulations and to occupy a limited field. Intent is never to be implied. *Missouri, Kansas and Texas Railway Company of Texas v. Harris,* 234 U. S. 412, 58 L. ed. 1377, 34 S. Ct. 790.

We will examine a few cases wherein there has been the question of Federal legislation pre-empting the field to the exclusion of state legislation. In the case of *Savage v. Jones,* 225 U. S. 501, 56 L. ed. 1182, 32 S. Ct. 715, the State of Indiana had adopted a regulation which required that anyone selling a commercial food product must label that product and on the label they must state the ingredients contained within the package. A foreign citizen from Minnesota objected on the grounds that the statute was repugnant to the Federal Food and Drug Act. The court held that the Federal Act was concerned with adulterated and misbranded foods but did not require a disclosure of ingredients while the State Act dealt particularly with this matter. The Court held the Indiana Statute valid and further that there was no conflict because the Congress had seen fit to circumscribe its legislation and to occupy a limited field. See also *Reid v. Colorado,* 187 U. S. 137, 47 L. ed. 108, 23 S. Ct. 92.

In *Maurer v. Hamilton,* 309 U. S. 598, 84 L. ed. 969, 60 S. Ct. 726, the State of Pennsylvania passed a law making it unlawful for a person to operate a vehicle on the highway carrying any other vehicle any part of which is above the cab of the carrier vehicle or over the head of the operator of the carrier vehicle. The plaintiff-appellant filed suit alleging the Act to be unconstitutional. While this

Although Congress and the State of Washington both had enacted legislation requiring an inspection of the hulls and machinery of motor driven tugs, the Supreme Court, in upholding the state law, reasoned that the local law was not inconsistent or incompatible with the Federal Law inasmuch as the state law related to tugs that were not embraced within the scope of the Congressional legislation.

In arriving at its decision, the Supreme Court set forth the following conclusions and well-accepted principles of law, which are material to the case presently before the court:

> "Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. * * * States are thus enabled to deal with local exigencies and to exert in the absence of conflict with federal legislation an essential protective power. And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulations shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'. * * *" (Pp. 10 and 11.)

> "The principle was thus emphatically stated: 'It should never be held that Congress intends to

supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested.' * * *" (P. 11.)

"The application of the principle is strongly fortified where the State exercises its power to protect the lives and health of its people. But the principle is not limited to cases of that description. * * * In the instant case, in relation to the inspection of the hull and machinery of respondents' tugs, the state law touches that which the Federal laws and regulations have left untouched. There is plainly no inconsistency with the Federal provisions. * * *" (Pp. 12 and 13.)

"We have found that in relation to the inspection of the hull and machinery of these tugs, in order to insure safety and seaworthiness, there is a field in which the state law could operate without coming into conflict with present Federal laws. Is that a subject which necessarily and in all aspects requires uniformity of regulation and as to which the State cannot act at all, although Congress has not acted? We hold that it is not. A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it may treat a diseased animal or unwholesome food. In such a matter, the State may protect its people without waiting for Federal action providing the state action does not come into conflict with Federal rules. If, however, the State goes further and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can establish a uniform rule. Whether the State in a par-

ticular matter goes too far must be left to be determined when the precise question arises.

> We have mentioned the inspection of hull and machinery of respondents' vessels in order to insure safety and seaworthiness. There may be other requirements of the state act which also lie outside the bounds of the Federal action thus far taken and as to which uniformity of regulation is not needed. That question cannot be satisfactorily determined on this record and must also remain for decision as it may be presented in the future in connection with some particular action taken by the state authorities. Our conclusion is that the state act has a permissible field of operation in relation to respondents' tugs and that the state court was in error in holding the act completely unenforceable in deference to Federal Law. * * *" (Pp. 14 and 15.)

The manifest objective of the Detroit Smoke Abatement Ordinance is to protect the health and welfare of the people of the City of Detroit by prohibiting the emission of smoke, except under certain circumstances, from any source whatever of a density equal to or greater than the density described as Number 2 of the Ringlemann Chart (App.).

No attempt is made by the City of Detroit in its ordinance to prescribe the type of equipment that must be used by vessels engaged in coasting or in interstate commerce. The City, however, requires that whatever type boiler equipment used, the vessel must not emit smoke beyond a specific density.

Federal laws relating to the inspection and licensing of vessels engaged in coasting and interstate commerce are comprehensive and are directed at insuring the seaworthiness of the vessels by requiring, *inter alia*, that a ship's boiler meet certain safety requirements. The Federal law neither makes an attempt to control the emission of smoke

by vessels nor does it attempt to prevent air pollution by vessels in communities through which they sail. Although the Congress of the United States and the Common Council of the City of Detroit have enacted legislation in the same general field, Congress has left untouched the area of smoke emission by vessels engaged in coasting or interstate commerce.

Approval and certification by the Coast Guard of a vessel's equipment is merely recognition of the vessel's seaworthiness, and, so far as seaworthiness is concerned, authorizes the vessel to engage in coasting and interstate commerce for specified periods of time. It is our contention that the effect of the issuance of a certificate by the Coast Guard in conformity with Federal law is not to grant *carte blanche* permission to a company engaged in business for profit to operate its vessels in any manner, no matter how harmful to others, merely because the vessel has been adjudged seaworthy by the Coast Guard.

As announced in *Kelly v. Washington, supra,* the exercise of a local government of its police powers is superseded by Federal law only where there is repugnance or conflict with the Federal law so "direct and positive" that the two laws cannot be reconciled or consistently stand together. In view of the respective objectives of the Federal and local law in the case at bar, it is urged that they are not incompatible and that they can consistently stand together.

The local ordinance makes no attempt whatever to impose vessel boiler standards to insure their safe operation or seaworthiness. Protection of the health and welfare of the people of the City of Detroit by preventing air pollution is the area of the field with which the local ordinance is concerned. Vessels producing noxious and harmful

smoke are not the proper instruments of interstate commerce, and it is strongly urged by the City of Detroit that the emission by a vessel of such smoke should not receive the protection of the Commerce Clause.

Again, in *Kelly v. Washington, supra,* the State of Washington argued that it had no intention of enforcing any local regulation that would conflict with Federal law; and, we wish to emphasize that the record in the case before this Court does not show that the City of Detroit ever required any inspection or licensing of the respondent's vessels. The only action taken by the City was to give respondent a violation notice for emitting smoke contrary to Section 2.2a of the Detroit Smoke Abatement Ordinance.

The Federal legislation in no way considers the problem of smoke emission, nor do the inspectors (Coast Guard) take into consideration the problem of air pollution when they make their annual inspections (App. 5a).

(A) Congress Has Determined Who Shall Be Responsible for the Regulation of Air Pollution.

The Congress of the United States enacted Public Law 159 on July 14, 1955. 69 Stat. 322, 323, Title 42 U. S. C. A. Sec. 1857, which provides in part (App. 5b):

> *Declaration of Policy.*
>
> "In recognition of the dangers to the public health and welfare, injury to agricultural crops and livestock, damage to and deterioration of property, and hazards to air and ground transportation, from air pollution, it is declared to be the policy of Congress to preserve and protect the primary responsibilities and rights of the States and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal

> technical services and financial aid to State and local government air pollution control agencies and other public or private agencies and institutions in the formulation and execution of their air pollution abatement research programs."

Volume 2, United States Code Congressional News, 1955, in discussing the above Federal Pollution Law said at page 2459 (App. 11b):

> "The Committee recognizes that it is the primary responsibility of state and local governments to prevent air pollution. The bill does not propose any exercise of police power by the Federal Government and no provision invades the sovereignty of states, counties or cities."

This Act was adopted by Congress with the intention of aiding various communities in their air pollution programs and at the same time Congress determined that air pollution would be the primary responsibility of local governments. We must assume that Congress is aware of the danger of air pollution and it hardly seems possible that while aiding such programs as provided for in the statute that Congress intended that those engaged in interstate commerce would be immune from prosecution by the various communities that the Federal Government was aiding, the defense of those engaged in interstate commerce being only that they did not wish to install or provide equipment that would comply with the emission standards of the particular ordinance.

(B) The Ordinance is Severable and Therefore Does Not Conflict with Federal Legislation.

The Common Council of the City of Detroit, in adopting the Smoke Abatement Code, provided for a severability clause as evidenced by Article 3, Section 3.1, which procides (App. 4b):

> "(3.1) If any clause, sentence, paragraph or part of this Ordinance, or the application thereof to any person, firm, corporation or circumstances, shall for any reason be adjudged by a Court of competent jurisdiction to be unconstitutional or invalid, said judgment shall not affect, impair or invalidate the remainder of this Ordinance and the application of such provision to other persons, firms, corporations or circumstances, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person, firm, corporation or circumstances involved. It is hereby declared to be the legislative intent of this body that this Ordinance would have been adopted had such invalid provisions not been included."

It is a fundamental principle that a statute or ordinance may be valid in one part and invalid in another part, and that, if the invalid part is severable from the rest, the part which is valid may be sustained. Accordingly, the fact that a statute or an ordinance is void in part does not necessarily render the whole statute or ordinance invalid; a court will sustain those parts which are valid and which are not necessarily dependent upon, or which are independent of, and not necessarily connected with, the void parts. *Southern Pacific Co. v. Portland*, 227 U. S. 559, 57 L. Ed. 642, 33 S. Ct. 308, aff'g 177 Fed. 958; *Western Union Tel. Co. v. Richmond*, 224 U. S. 160, 56 L. Ed. 710, 32 S. Ct.

449, aff'g 178 Fed. 310; *Lowe v. City Council of Augusta*, 45 F. Supp. 143. In other words, if the different sections of an ordinance are independent of each other, the invalid portion thereof may be eliminated and the valid sections may be retained and enforced. Or, as it also has been said, where the unconstitutional or void provision or part of a statute or ordinance can be severed from other parts, the Court may not be required to pass on the validity of the other parts. The test is: Has the legislative body manifested an intention to deal with a part of the subject-matter covered, irrespective of the rest of the subject-matter? If such intention is manifest, the subject-matter is separable, otherwise not. *El Paso & N. W. Ry. Co. v. Gutierrez*, 215 U. S. 87, 97, 54 L. Ed. 106, 30 S. Ct. 21, 25; *Employers' Liability Cases*, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141. The leading case on this matter would be *Williams v. Sandard Oil Co.*, 278 U. S. 235, 73 L. ed. 287, 49 Sup. Ct. 115.

The appellant claims that Section 2.16 and Section 2.17 of the City of Detroit Ordinance (R. 37) (App. 6a) are in conflict with Federal legislation. We wish to point out that to carry out the purposes of the Ordinance it would not be necessary to have Section 2.16 or 2.17 contained in the ordinance. The intention of the City of Detroit is the regulation of air pollution, not inspection and licensing, which is only one of many ways adopted to help enforce the purpose of the ordinance. Sec. 2.2A which prohibits the emission of dense smoke, and Sec. 3.1 which provides for a penalty for violating the ordinance are not dependent on any other part of the ordinance and are therefore severable and any conflict with the Federal law would not void the ordinance so as to affect the City's right to regulate air pollution.

We submit that the Congress of the United States had no intention of regulating air pollution when they adopted

the laws pertaining to steamships; that Congress has determined as a matter of policy that the control of air pollution rests with the states and municipalities; that if there is any conflict with the Federal regulation the ordinance of the city of Detroit is severable and that part which may be invalid would not apply and the valid part would still be enforceable. Therefore, we must conclude that there is no pre-emption by Federal Law.

II.

IF CONGRESS HAS NOT EXPRESSLY PRE-EMPTED THE FIELD, THE DETROIT SMOKE ORDINANCE MATERIALLY AFFECTS INTERSTATE COMMERCE IN MATTERS WHERE UNIFORMITY IS NEEDED.

Since *Cooley v. Warden*, 12 Howard (U. S.) 299, 13 L. ed. 996, the law has been as stated in *15 C. J. S.* See Commerce, Sec. 11, page 268:

> "However the constitutional grant to Congress of power to regulate interstate commerce, although operating of its own force to curtail state power in some measure, does not forestall all state action affecting interstate commerce; it does not withdraw from the states power to legislate in respect of their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce. Although state legislation affects interstate commerce incidentally, indirectly, or remotely, yet where it does not undertake to regulate such commerce and is no more than a bona fide, legitimate, and reasonable exercise of the reserved police power of the state in respect of a matter of local or internal concern, it is valid and * * * will stand, in the absence of conflicting and superseding legislation by congress in the exercise of its superior authority to regulate commerce among the states."

In the absence of paramount regulation thereof by Congress the States may regulate matters which are not national in character and do not admit of only one system or plan of regulation, but which are of a local nature, admitting of diversity of treatment according to local exigencies, although affecting interstate or foreign commerce and falling within the regulatory power of Congress, should that body see fit to act in the premises, and this Court has so stated in the following cases:

In the case of *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 8 S. Ct. 564, the State of Alabama had enacted a law requiring that engineers operating any train in the State of Alabama apply and be examined for a license to operate a train within said State. The Supreme Court of the United States in upholding the validity of the State Act said:

> "In conferring upon Congress the regulation of commerce *it was never intended to cut states off from legislating on all subjects relating to the health, life and safety of their citizens though the legislation might indirectly affect the commerce of the country.* Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." (Emphasis supplied.)

In *Atlantic Coast Line Railroad Co. v. Georgia*, 234 U. S. 280, 58 L. Ed. 1312, 34 S. Ct. 829 the Atlantic Coast Line Railroad Company, the plaintiff, in error, was convicted of violating a statute of the State of Georgia known as the "Headlight Law", which provided that trains while operating in Georgia must have a certain type of headlight. Pub. Laws (Ga.) 1908, pp. 50, 51; Civil Code, 2697, 2698. In defense it was insisted that the act contravened the commerce clause and the 14th Amendment of the Constitution of the

United States. It was argued that if Georgia may prescribe an electric headlight, other states through which the road runs may require headlights of a different sort; that, for example, some may demand the use of acetylene and that others may require oil; and that, if state requirements conflict, it will be necessary to carry additional apparatus and to make various adjustments at state lines, which would delay and inconvenience interstate traffic.

But the court ruled that these possible inconveniences could not affect the question of power in each state to make reasonable regulations for the safety of passengers on interstate trains as, in its judgment, all things considered, is appropriate and effective. In thus deciding, the court said:

> "The states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal action, the use of such agencies, which, unless carefully guarded, was fraught with danger to the community, should go unregulated, and that the states should be without authority to secure needed local protection. The requirements of a state, of course, must not be arbitrary, or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state, in the exercise of a similar power, may not impose the same regulation."

In *Erb v. Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 S. Ct. 819, the Court in upholding the right of a city to regulate the speed of trains in the city said:

> "* * * that a city, when authorized by the legislature, may regulate the speed of railroad trains

within the city limits. *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734; *Cleveland, C. C. & St. L. R. Co. v. Illinois ex rel. Jett*, 177 U. S. 514, *ante*, 868, 20 Sup. Ct. Rep. 722. Such act is, even as to interstate trains, one only indirectly affecting interstate commerce, and is within the power of the state until at least Congress shall take action in the matter."

Clason v. Indiana, (306 U. S. 439-444), 83 L. ed. 858, 59 S. Ct. 609, was an appeal by defendant from a judgment of the Supreme Court of Indiana affirming a conviction in the Elkhart Circuit Court of violating a state statute by transporting a dead horse over the highways of the state and into another state without the required license. The Court said in part:

"The power of the State to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. Such articles, it has been declared by this court, are not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of the Constitution * * *. Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the State."

Sligh v. Kirkwood, 237 U. S. 52, 59, 60, 59 L. ed. 835, 837, 838, 35 S. Ct. 501.[1]

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[1] The Courts have also upheld state action in the following cases:

A statute obligating every ship arriving from or bound to any foreign port, and every ship of 75 tons or more, sailing or bound to any port not within the River Delaware, to receive a pilot. *Cooley v. Port Wardens* (1851), 12 How. (U. S.) 299, 13 L. ed. 996; and to the same effect, *Ex parte McNeil* (1872), 13 Wall. (U. S.) 236, 20 L. ed. 624.

(Continued on next page)

The question before this court is not only whether there is a direct or indirect burden on interstate commerce but whether the national interest outweighs the interest of the city or local government.

In *Parker v. Brown* (317 U. S. 341-368, 63 S. Ct. 307, 87 L. ed. 315), the question for consideration was whether the marketing program adopted for the 1940 raisin crop under the California Agricultural Prorate Act is rendered

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(Continued from preceding page)

A statute authorizing the construction of a bridge over a navigable river whose waters lay wholly within the state, although the bridge would prevent the passage of many ships engaged in interstate and foreign commerce. *Gilman v. Philadelphia* (1866), 3 Wall. (U. S.) 713, 18 L. ed. 96.

An act of Alabama for the improvement of the river, bay and harbor of Mobile. *Mobile County v. Kimbell* (1881), 102 U. S. 691, 26 L. ed. 238.

A regulation whereby a drawbridge over a navigable river wholly within the state was not to be raised during a period of one hour each morning and evening, and only for ten minutes at a time during the rest of the day. *Escanaba & L. M. Transp. Co. v. Chicago* (1883), 107 U. S. 678, 27 L. ed. 442, 2 S. Ct. 185.

A municipal ordinance requiring the payment of wharfage charges for use of a city-owned wharf. *Parkersburg & O. River Transp. Co. v. Parkersburg* (1883), 107 U. S. 691, 27 L. ed. 584, 2 S. Ct. 732.

An act of Louisiana which, in connection with State quarantine laws, imposed a fee for the examination of ships and their passengers at a station on the Mississippi River more than 75 miles below New Orleans. *Morgan's L. & T. R. & S. S. Co. v. Board of Health* (1886), 118 U. S. 455, 30 L. ed. 237, 6 S. Ct. 1114.

A statute prohibiting the operation on any highway in the state of any vehicle exceeding prescribed limitations in size, or any vehicle not constructed or equipped as required by the statute, and also prohibiting the transportation of any load exceeding the dimensions and weight allowed by the act. *Sproles v. Binford* (1932), 286 U. S. 374, 76 L. ed. 1167, 52 S. Ct. 581; and see *South Carolina State Highway Department v. Barnwell Bros.* (1938), 303 U. S. 177, 58 S. Ct. 510.

invalid by the Sherman Act, or by the Agricultural Marketing Agreement Act of June 3, 1937, as amended, 7 USCA, 601 *et seq*, or by the Commerce Clause of the Constitution. The Court in declaring that there was no need for uniformity of regulation and that the commerce clause did not preclude the enforcement of the State Act said:

> "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. See *DiSanto v. Pennsylvania*, 273 U. S. 34, 44, 71 L. ed. 524, 530, 47 S. Ct. 267 (with which compare *California v. Thompson*, 313 U. S. 109, 85 L. ed. 1219, 61 S. Ct. 930, *supra*); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 82 L. ed. 734, 58 S. Ct. 510, *supra*; *Milk Control Bd. v. Eisenberg Farm Products*, 306 U. S. 346, 83 L. ed. 752, 59 S. Ct. 528; *Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Com.*, 314 U. S. 498, 504, 505, 86 L. ed. 371, 375, 376, 62 S. Ct. 384.
>
> "Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct', see *DiSanto v. Pennsylvania*, 273 U. S. 34, 71 L. ed. 524, 47 S. Ct. 267, *supra*; cf. *Wickard v. Filburn*, 317 U. S. 111, *ante*, 122, 63 S. Ct. 82, *supra*, not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may

> never be adequately dealt with by Congress. Because of its local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. See *Minnesota Rate cases (Simpson v. Shepard), supra* (230 U. S. 398-412, 57 L. ed. 1540-1547, 33 S. Ct. 729, 48 L. R. A. (NS) 1151, Ann Cas 1916A 18); *California v. Thompson, supra* (313 U. S. 113, 85 L. ed. 1221, 61 S. Ct. 930). There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it."

We believe the interest of the city is paramount when weighing the national interest versus the local needs. It does not seem proper that appellant should be allowed to emit dense black smoke to the detriment of the health and comfort of the citizens of Detroit because they are engaged in interstate commerce. We have cited many cases extensively because they indicate better than any argument that could be found, the extent of the authority of the state to exercise its police power to protect the health and safety of its citizens where such power also affects interstate commerce. These cases also indicate to some extent that in matters of health and safety the "nesessity of uniformity" is the exceptional case and not the rule when the object of the regulation is not commerce but a legitimate attempt to protect the people of a state or city.

At the trial of this matter there was testimony to the effect that there was equipment available which if installed would comply with the ordinance and be approved by the Coast Guard (R. 14-15-16). Common sense dictates that such equipment be employed by the appellant and other

ship owners, who come within the city limits of the City of Detroit.

In *Northwestern Laundry v. DesMoines*, 239 U. S. 486, 60 L. ed. 396, 36 S. Ct. 206, the City of Des Moines adopted an ordinance which prohibited the emission of dense smoke and declared that such smoke was a nuisance. There was argument to the effect that the ordinance would require the remodeling of old or the reconstruction of new heating devices; also that there did not appear to be any known devices which would permit compliance with the terms of the ordinance. The Court in upholding the validity of the municipal ordinance said:

> "So far as the Federal Constitution is concerned, we have no doubt the State may by itself, or through authorized municipalities, declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objects. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property, or subject the occupant to large expense in complying with the terms of the law or ordinance."

It should be noted that the ship in question, the S. T. Crapo, was built 33 years ago in 1927. For all practical purposes such a ship, in considering depreciation, is almost obsolete. The argument that money will have to be spent for new equipment is neither a valid legal argument nor is it a valid economic argument (Pl. Ex. 2 R. 38).

Harmon v. City of Chicago, 110 Ill. 400, was an early case wherein the Supreme Court of the State of Illinois upheld a Chicago ordinance which regulated the emission

of dense smoke by tugboats engaged in interstate commerce. They concluded that such an ordinance was not in conflict with Section 8, Article 1 of the Federal Constitution which declares that "Congress shall have the power to regulate commerce." Such a regulation by the city does not impose any restraint on the use of such vessels, although engaged in general commerce, other than is consistent with law. Controlling the use of tugboats towing vessels in and out from the harbor is in no sense in conflict with the power existing in Congress to regulate commerce with foreign nations and among the several States.

We think that the cases that have been cited show that the States have exercised authority over interstate commerce in almost every field of commercial endeavor, and, the State regulations have been upheld because the interest of the state or municipality was paramount to the national interest; it should also be noted that in the cases cited that the municipalities and states were exercising their authority to protect the health, safety and welfare of their citizens which is their right under the police power, such legislation not being aimed at interstate commerce. We believe the language contained in *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 88 L. ed. 1227, 64 S. Ct. 70, most clearly states the position of the City of Detroit in this matter, wherein the court said:

> "But the Commerce Clause does not cut the States off from all legislative relation to foreign and interstate commerce. *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 82 L. ed. 734, 58 S. Ct. 546, 115 A. L. R. 944. Such commerce interpenetrates the States, and no undisputed generality about the freedom of commerce from state encroachment can delimit in advance the interacting areas of state and national power when Congress has not by legislation foreclosed state action. The

incidence of the particular state enactment must determine whether it has transgressed the power left to the States to protect their special state interests although it is related to a phase of a more extensive commercial process.

We have considered literally scores of cases in which the States have exerted authority over foreign corporations and in doing so have dealt with aspects of interstate and foreign commerce. Whatever may be the generalities to which these cases gave utterance and about which there has been, on the whole, relatively little disagreement, the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances.

To deny the States the power to protect such special interests when Congress has not seen fit to exert its own legislative power would be to give an immunity to detached aspects of commerce unrelated to the objectives of the Commerce Clause. By its own force that clause does not imply relief to those engaged in interstate or foreign commerce from the duty of paying an appropriate share for the maintenance of the various state governments. Nor does it preclude a State from giving needful protection to citizens in the course of their contacts with businesses conducted by outsiders when the legislation by which this is accomplished is general in its scope, is not aimed at inter-state or foreign commerce, and involves merely burdens incident to effective administration."

(A). Only the Detroit Ordinance is Before the Court.

It is the contention of the appellees that the only matter before the court is the validity of the Detroit Smoke Abatement Code and not some ordinance or some situation that is beyond the record before this Court. It is always possible to take any legislation and by presenting hypothetical situations have such legislation appear unreasonable and unconstitutional. We think the language used by the court in *Lake Shore & Michigan Southern Railway Company v. Ohio*, 173 U. S. 285, 43 L. ed. 702, is most appropriate:

> "Imaginary cases are put for the purpose of showing what might be done by the state that would seriously interfere with or discriminate against interstate commerce, if the statute in question be upheld as consistent with the Constitution of the United States. Without stopping to consider whether the illustrations referred to are apposite to the present inquiry, it is sufficient to say that it is always easy to suggest extreme cases for the application of any principle embodied in a judicial opinion. Our present judgment has reference only to the case before us, and when other cases arise in which local statutes are alleged not to be legitimate exertions of the police powers of the state, but to infringe upon national authority, it can then be determined whether they are to be controlled by the decision now rendered. It would be impracticable, as well as unwise, to attempt to lay down any rule that would govern every conceivable case that might be suggested by ingenious minds."

and also the statement made by Justice Swayne, in *Gilman v. Philadelphia, supra:*

> "In the pilot case the dissenting Judge drew an alarming picture of the evils to rush in at the breach made, as he alleged, in the constitution. None have

> appeared. The stream of events has since flowed on without a ripple due to the adjudication."

We should not view with alarm what other communities are going to do. We believe that the hypothetical cities as have been mentioned will adopt regulations, in good faith, that can be complied with by the appellant. If they (hypothetical cities) adopt regulations that are unreasonable, then we can assume that this Court will be here at that time to deal with that matter.

(B) An Ordinance May Be Made More Restrictive

We find in the case of *Morris v. Duby*, 274 U. S. 135, 71 L. Ed. 966, 47 S. Ct. 548 that the State of Oregon had allowed trucks to have a combined load limit of 22,000 pounds while operating on the state highway. The road in question was an interstate highway and Federal funds had been used in its construction. The State Highway Commission ordered that the combined load be now reduced to 16,500 pounds. One of the plaintiff's complaints was that he had been in competition with the railroads for business and as a result of the load reduction, he would be prevented from doing business except at a loss. The Court, in upholding the right of a State to change its laws and be more restrictive, said:

> "The mere fact that a truck company may not make a profit unless it can use a truck with a load weighing 22,000 or more pounds does not show that a regulation is either discriminatory or unreasonable."

It would appear that a state or municipality would always have the right to change their laws; however, that

fact should not determine that an existing law is unconstitutional. Each ordinance should stand or fall on its own and should not be considered invalid because a legislative body may at a future date make the law unreasonable.

The appellant in his brief cites the case of *People of the State of New York v. Cunard White Star, Limited*, 280 N. Y. 413, 21 N. E. 2d 489 (1939). The case is not in point on any matter that is raised in this case. In the course of its opinion the New York appellate court said this:

> "The validity of the ordinance is not challenged, if its scope is limited to prohibition of the discharge of smoke, avoidable by the use of modern appliances and of methods which are practicable. So limited, the ordinance is reasonably calculated to protect the health and comfort of residents and visitors in the city of New York, and the Legislature has delegated to city officers the power to pass such ordinances. The defendant is engaged in foreign commerce which, though subject to regulation by the Congress of the United States, *is not immune from the police power. The defendant does not claim such immunity.* It asks the court to reverse the conviction for violation of the ordinance, on the ground that the ordinance is unreasonable and the police power does not justify unreasonable obstruction of its business as carried in foreign commerce." (Emphasis supplied.)

The factual situation in the instant case being far different than the situations that exist in the cases cited by the plaintiff, we do not believe they are in point.

We argue that uniformity is not necessary and not desirable. We believe the emission of dense smoke and the control thereof rests logically with local governments. We argue further that considering all the factors that the congress of the United States cannot adequately deal with all

of the problems that are involved in the regulation of air pollution. It is obvious that the restrictions necessary in the industrial areas such as Los Angeles, Pittsburgh and Detroit are not needed or wanted in other areas of the country.

The science of air pollution control has advanced considerably during the past decade. The pollution of the atmosphere has been recognized throughout the nation as an evil which must be controlled if the health and welfare of our population is to be protected. To protect the health of its people is one of the chief functions of the city. To say that the City of Detroit or any city in the union whose waters are traversed by boats which are emitting smoke, ash and fumes injurious to the health and well-being of its inhabitants cannot pass and enforce laws for the protection of its people because such laws might impose upon ship owners the expenditure of sums of money for the installation of devices that science in this field now knows to be effective would be putting a premium on constitutional theory. The city does not seek in this instance to dictate to the owners what they must do or what they must install, but leaves that up to their own discretion and devices; it merely proscribes the emissions from their ships of substances which are deleterious and injurious to the health and well-being of its citizens.

CONCLUSION

We request that the court determine that the City of Detroit may prosecute the appellant for emitting smoke in violation of the terms of the Detroit smoke ordinance, and that the decree of the lower court be affirmed and that the smoke ordinance of the City of Detroit be held constitutional.

Respectfully submitted,

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APPENDIX

STATUTES

70 Stat. 223, 46 U. S. C. 391 (1952 ed.)

(a) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every year thereafter, the hull of every steam vessel carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for passengers and the crew, and is in a condition to warrant the belief that she may be used in navigation, with safety to life, and that the vessel is in full compliance with the applicable requirements of this title or Acts amendatory or supplementary thereto and regulations thereunder; and if deemed expedient, to direct the vessel to be put in motion or to adopt any other suitable means to test her sufficiency and that of her equipment.

Steam vessels not carrying passengers; biennial inspection

(b) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every two years thereafter, the hull of each steam vessel not carrying passengers; to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew,

and is in a condition to warrant the belief that she may be used in navigation, with safety to life, and that the vessel is in full compliance with the applicable requirements of this title or Acts amendatory or supplementary thereto and regulations thereunder; and if deemed expedient, to direct the vessel to be put in motion or to adopt any other suitable means to test her sufficiency and that of her equipment.

Sail vessels over 700 tons or other vessels and barges over 100 tons carrying passengers; annual inspection

(c) The head of the department in which the Coast Guard is operating shall require the Coast Guard to inspect before the same shall be put into service, and at least once in every year thereafter, the hull of each sail vessel of over seven hundred gross tons carrying passengers for hire and all other vessels and barges of over one hundred gross tons carrying passengers for hire; and to determine to its satisfaction that every such vessel so submitted to inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the passengers and crew, and is in condition to warrant the belief that she may be used in navigation with safety to life.

Requirements and enforcement; appeals

(d) Whenever it is found on board any vessel subject to the provisions of this title, or any Acts amendatory or supplementary thereto, that any equipment, machinery, apparatus, or appliances do not conform to the requirements of law or regulations promulgated thereunder, the owner or master of said vessel shall be required to place the same in proper condition; and if there shall be found on board any such vessel any life preserver or fire hose so defective as to be incapable of repair, the owner or master shall be required to destroy the same in the presence

of an official designated by the head of the department in which the Coast Guard is operating. In any of the foregoing cases the requirements may be enforced by revoking the certificate of said vessel, and by refusing to issue a new certificate until the requirements have been fully complied with. In any case where the head of the department in which the Cosat Guard is operating has delegated to a Coast Guard official the authority to enforce the said requirements by revocation of certificates of inspection, the action of said Coast Guard official may be reversed, modified, or set aside by the head of the department in which the Coast Guard is operating on proper appeal by the owner or master of said vessel. Appeals shall be made to the head of the department in which the Coast Guard is operating within thirty days after the final action of the aforesaid Coast Guard official.

Exemptions

(e) Vessels subject to inspection under this title or Acts amendatory or supplementary thereto while laid up and dismantled and out of commission may, by regulations established by the head of the department in which the Coast Guard is operating, be exempted from any or all inspection under this section and sections 392, 404, and 405 of this title.

STATUTES

69 Stat. 322, 42 U.S.C. 1857 (1952 ed.)

"In recognition of the dangers to the public health and welfare, injury to agricultural crops and livestock, damage to and deterioration of property, and hazards to air and ground transportation, from air pollution, it is declared to be the policy of Congress to preserve and protect the

primary responsibilities and rights of the States and local governments in controlling air pollution, to support and aid technical research to devise and develop methods of abating such pollution, and to provide Federal technical services and financial aid to State and local government air pollution control agencies and other public or private agencies and institutions in the formulation and execution of their air pollution abatement research programs. To this end, the Secretary of Health, Education, and Welfare and the Surgeon General of the Public Health Service (under the supervision and direction of the Secretary of Health, Education, and Welfare) shall have the authority relating to air pollution control vested in them respectively by this chapter."

SMOKE ABATEMENT CODE

Ordinance No. 167-E

Article 3—Severability

Sec. 3.1. If any clause sentence, paragraph or part of this Ordinance, or the application thereof to any person, firm, corporation or circumstances, shall for any reason be adjudged by a Court of competent jurisdiction to be unconstitutional or invalid, said judgment shall not affect, impair or invalidate the remainder of this Ordinance and the application of such provision to other persons, firms, corporations or circumstances, but shall be confined in its operation to the clause, sentence, paragraph or part thereof directly involved in the controversy in which such judgment shall have been rendered and to the person, firm, corporation or circumstances involved. It is hereby declared to be the legislative intent of this body that this Ordinance would have been adopted had such invalid provisions not been included.

OPINION OF THE ATTORNEY GENERAL OF THE STATE OF MICHIGAN, No. 2370, August 6, 1956

• • • "For the purpose of assisting us in determining whether the administrative officers of the Coast Guard considered this statute as vesting the federal government with authority to control and abate smoke emissions from ships, we addressed an inquiry to Commander F. B. Thatcher, District Legal Officer of the U. S. Coast Guard. In his answer, dated May 16, 1956, Commander Thatcher stated:

> " 'In regard to your letter of 11 May 1956, as to whether the Marine Inspection Laws of the United States or any other laws of the United States concern themselves with the smoke nuisance created by vessels on navigable waters of the United States, you are advised that this officer has found no Federal Laws or regulations which would control this nuisance or make it an offense under the laws of the United States. From a practical standpoint the owners of these vessels, in most instances, have installed smoke arrestors to curb the nuisance and protect themselves against suit arising out of such conditions. The officers have instructed personnel to fire and attend to their marine plants in such a way as to reduce smoke. In most of the cities in coastal regions and in quite a few of the Great Lakes there are specific ordinances directed against this nuisance. At the Port of New Orleans, where I was last stationed, the City of New Orleans had an ordinance imposing a stiff penalty for its violation and while I was there, there were several occasions in which the City penalized the owners, operators and masters for creating this nuisance. Since I have been in this District there has been only one occasion where a smoke nuisance has been called to

my attention and that is at Frankfort, where the Ann Arbor Car Ferries were practically blanketing the Station property with smoke every time one of the vessels entered or left the harbor. These vessels, to my understanding, are equipped with smoke arrestors, but the personnel were not using the equipment and were inept in the manner in which they were firing the boilers. It became necessary to threaten that legal action would be taken in the event the nuisance was not abated and the Railroad has agreed to take all action possible to abate this practice. The only action that possibly the Coast Guard could take would be directed against licenses and certificates of personnel in the event they were found guilty of violating a smoke ordinance or state law and there was a showing of negligence, inattention to duty or misconduct on the part of the licensed or certificated person while working under said license or certificate. (46 U. S. C. 239 as amended.)

" 'In conclusion, it would appear that this is a matter to be regulated and controlled by local authority because of the varying conditions existing in the specific localities and something which could not be legislated upon at the national level.' * * *"

VOL. 2, U. S. CODE, CONGRESSIONAL NEWS, 1955

AIR POLLUTION CONTROL

AIR POLLUTION CONTROL—RESEARCH AND TECHNICAL ASSISTANCE

For text of Act see p. 351

Senate Report No. 389, May 27, 1955 [To accompany S. 928]
House Report No. 968, June 28, 1955 [To accompany S. 928]
The House Report repeats in substance the Senate Report.

Senate Report No. 389

The Committee on Public Works, to whom was referred the bill (S. 928) to amend the Water Pollution Control Act in order to provide for the control of air pollution, having considered the same, report favorably thereon with amendment and recommends that the bill, as amended, do pass.

The amendments are indicated in the bill as reported by line type and italics. The title of the bill has been amended to conform to changes in language and to make clear the objectives of this measure.

PURPOSE OF THE BILL AS AMENDED

Within recent years it has become increasingly evident that the health, comfort, and well-being of our people in many parts of the country are affected by contamination of the atmosphere in which they live. There is acknowledged need to determine the causes of air pollution, the meteorological factors and chemical elements involved, the effects, and possible preventive measures.

The purpose of this bill is to authorize the Department of Health, Education, and Welfare, through the United States Public Health Service, to utilize the resources of the Federal Government and to cooperate with State and local governments and educational institutions in the preparation and execution of programs of research into the problem of air contamination. The bill will make possible technical and financial aid for joint efforts and provides for the collection and dissemination of information which would be valuable to local agencies striving to abate pollution of the atmosphere.

NEED FOR SUCH LEGISLATION

There is no doubt that the emission of fumes and particles into the air above heavily populated communities and industrial centers is causing a condition described in a variety of terms, including "smog" and "smaze."

While a few areas have attracted unusual attention because of air contamination the problem is rapidly becoming serious and causing alarm in many places. Tragic results have followed unexplained occurrences of fumes, fog, and murkiness in the past, as in the Meuse Valley in Belgium, in London, in Donora, Pa., and in Poza Rica, Mexico, during present history.

LEGISLATIVE HISTORY

Considerable publicity has been given to "smog" sieges in Los Angeles and public officials have indicated fear that like conditions may be developing in such widely separated cities as New York and Cleveland.

Commendable efforts are being made in many communities to isolate the causes of air contamination and bring about control for protection of our people. However, the

work underway at present is largely uncoordinated and in need of both acceleration and technical assistance. A solution of the problem is delayed by inadequate observations, insufficient exchange of data, and limited know-how, facilities, and funds.

FEDERAL ASSISTANCE POSSIBLE

There are a number of Federal agencies particularly qualified and equipped to conduct research into the problem of air pollution. Among these are the Weather Bureau, the Bureau of Mines, the Bureau of Standards, the National Institutes of Health, the Agricultural Research Service, and the Atomic Energy Commission.

It is the opinion of the committee that the Department of Health, Education, and Welfare can best coordinate efforts of Federal agencies and cooperate with and aid other bodies, State and local, public and private, in formulating and carrying out research programs directed toward abatement of air pollution.

The laboratories of the Federal Government, the testing techniques, the records of weather conditions, the trained personnel, and the apparatus and equipment now in existence cannot be duplicated easily, quickly, or economically by any non-Federal agency seeking to counteract the air contamination menace.

Consequently, it is the opinion of the committee that the Federal Government should employ its resources to further the attack against pollution of the atmosphere.

EXPLANATION OF THE BILL

It is the opinion of the committee that considerable time may be needed to produce useful results. Therefore, this bill authorizes a 5-year program of research and coopera-

tion. A lesser period would be insufficient to test theories and make painstaking studies. In the opinion of the committee, authorization for Federal participation in the field of air-pollution research is of such great importance as to justify a specific authorizing statute.

The bill would authorize an unusual appropriation, beginning July 1, 1955, and continuing until June 30, 1960, in an amount not to exceed $3 million annually, for expenditure by the Secretary of Health, Education, and Welfare to carry on these functions. The money would be available for technical services by other Federal departments or agencies whose facilities and personnel are employed in the program, and for grants-in-aid to State and local governmental bodies and public and private educational institutions engaged in attempting to solve the air-pollution problem through research.

The grants-in-aid would be provided through agreements whereby qualified and experienced groups would undertake investigations and experiments and would make available to the entire Nation the benefit of their work.

The bill provides for a close integration of effort through an advisory body which would evaluate suggestions about research projects and provide a clearing house for data presently available. The Commission would include both representatives of the Federal Government and non-Federal members whose responsiblities, experience, and interest make them particularly qualified to give counsel and guidance. The President would have the right to select individuals from scientific circles, from industries that might be most concerned, or from the public at large.

REASONS FOR ACTION

The President has recognized the serious nature of the air-pollution problem on several occasions. Already he has created an ad hoc Advisory Committee on Community Air Pollution to canvass the facilities of the Federal Government which might be utilized in attacking it. In his state of the Union message last January he said he would call on Congress to take appropriate action against this menace. In his special health message, he stated:

As a result of industrial growth and urban development, the atmosphere over some population centers may be approaching the limit of its ability to absorb air pollutants with safety to health. I am recommending an increased appropriation to the Public Health Service for studies seeking necessary scientific data and more effective methods of control.

Thus the proposed measure will carry out recommendations from many sources. During the hearings, the committee received testimony in support of the bill from representatives of communities and local governments in all parts of the Nation. The legislation has been endorsed by the American Medical Association, the American Municipal Association, and representatives of county governments.

The committee recognizes that it is the primary responsibility of State and local governments to prevent air pollution. The bill does not propose any exercise of police power by the Federal Government and no provision in it invades the sovereignty of States, counties, or cities. There is no attempt to impose standards of purity.

At the same time, the program which would be made possible by this legislation should stimulate State and local agencies as well as aid them in dealing with phases of the

problem with which they are most immediately concerned. The problem of research into the causes and ultimate elimination of air pollution is so complex and vast that it is not realistic to expect a solution through uncoordinated efforts of a multitude of agencies.

Reports from the Department of Health, Education, and Welfare, the Bureau of the Budget, Department of the Air Force, and the Department of Agriculture, commenting on the provisions of S. 928 as introduced, are as follows:

* * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 86

HURON PORTLAND CEMENT COMPANY,
a Michigan corporation,
Appellant,
vs.
CITY OF DETROIT, a Michigan municipal corporation,
BENJAMIN LINSKY, Chief, Bureau of Smoke
Abatement, P. J. LAREAU,
Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE
OF MICHIGAN

REPLY BRIEF FOR APPELLANT

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APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

REPLY BRIEF FOR APPELLANT

ARGUMENT

I.

WHERE CONGRESS HAS PROVIDED FOR THE INSPECTION AND LICENSING OF STEAMSHIPS, A CITY MAY NOT APPLY ITS SMOKE ORDINANCE TO SUCH STEAMSHIPS WHERE THE ORDINANCE IN EFFECT PROHIBITS THE USE OF THE EQUIPMENT ON SUCH STEAMSHIPS.

On pp. 3-5 of their brief, appellees argue that the Detroit smoke ordinance was enacted for the purpose of abating smoke, and that the federal acts, governing the inspection of steamships, were enacted for the purpose of protecting the safety of the vessels, crew, freight and passengers. The argument as to the difference in purpose is answered by *Napier v. Atlantic Coast Line Railroad*, 272 U. S. 605, 613 (1926) wherein it was said:

> "Because the standards set by the Commission must prevail, requirements of the States are precluded, however commendable or however different their purpose."

On p. 7 of their brief, appellees cite some cases which involve the doctrine that where Congress has seen fit to circumscribe its regulation and to occupy a limited field, a state is not precluded from acting in the field not occupied by Congress. That doctrine has no application here because Congress has very comprehensively provided for the inspection of vessels and their equipment and for the licensing of the vessels. Appellees, throughout their brief, ignore the fact that the Detroit ordinance does prescribe the kind of equipment which must be used upon the vessels in that it permits *only* the use of such equipment as complies with the City's ordinance.

On pp. 7 and 8 of their brief, appellees cite *Maurer v. Hamilton*, 309 U. S. 598, and *H. P. Welch Co. v. State of New Hampshire*, 306 U. S. 79. Both of those cases are concerned with state laws governing the operation of vehicles on highways and those cases have no application here because states have been granted much greater latitude in the control of interstate commerce where highways are involved than in any other cases.

Railway Express v. New York, 336 U. S. 106, 111 (1949):

> "Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authority, even though the local regulation materially interferes with interstate commerce."

On pp. 9-12 of their brief, appellees discuss the case of *Kelly v. Washington*, 302 U. S. 1. We believe that in certain instances appellees have misinterpreted the case. They state, on page 10 of their brief, that although Congress and the State of Washington both had enacted legislation requiring an inspection of the hulls and machinery of motor-driven tugs, the Supreme Court, in upholding the state law, reasoned that the local law was not inconsistent or incompatible with the Federal Law inasmuch as the state law related to tugs that were not embraced within the scope of the Congressional legislation. In the *Kelly* case, the Supreme Court considered three different questions: First, whether the state legislation, as applied to respondents' motor-driven tugs, was in all respects in conflict with express provisions of federal laws and regulations. On page 8, the Court found that the conclusion was inescapable that there was no provision of the federal laws and regulations for the inspection of the hull and machinery of respondents' motor-driven tugs and said:

> "It follows that inspection of the hull and machinery of these tugs by state authorities in order to insure safety and determine seaworthiness is not in conflict with any express provision of the federal laws and regulations."

The second question considered was whether the federal statutes were to be construed as implying a prohibition of inspection by state authorities of hull and machinery to insure safety in the case of vessels which in this respect lies outside the federal requirements. The Court found no implied prohibition and said at p. 13:

> "It would hardly be asserted that when Congress set up its elaborate regulations as to steam vessels, it deprived the State of the exercise of its protective powers as to vessels not propelled by steam."

This sentence suggests that as to steam vessels, as to which Congress had set up elaborate regulations, such a prohibition would be implied.

The third question considered by the Supreme Court was whether the subject was one as to which uniformity of regulation is required and, hence, whether or not Congress has acted, *the state is without authority.* The Court pointed out that Congress may establish standards and designs for the equipment of vessels and prescribe rules for their operation which could not properly be left to the action of the states because the states might prescribe different standards and equipment. The Court said, p. 15:

> "A vessel which is actually unsafe and unseaworthy in the primary and commonly understood sense is not within the protection of that principle. The State may treat it as it would treat a diseased animal or unwholesome food. In such a matter, the State may protect its people without waiting for fed-

> eral action providing the state action does not come into conflict with federal rules. If, however, the State goes further and attempts to impose particular standards as to structure, design, equipment and operation which in the judgment of its authorities may be desirable but pass beyond what is plainly essential to safety and seaworthiness, the State will encounter the principle that such requirements, if imposed at all, must be through the action of Congress which can established a uniform rule."

The state court had held the Washington act unconstitutional and the Supreme Court reversed only to the extent that the state could inspect a vessel to determine if it was actually unsafe and unseaworthy in the primary sense.

Appellees, on p. 12 of their brief, argue that the smoke ordinance makes no attempt to prescribe the type of equipment that must be used, but continue:

> "The City, however, requires that whatever type boiler equipment used, the vessel must not emit smoke beyond a specific density."

The federal inspection laws require that the boilers and equipment be safe, and do not specify the type of equipment. The Detroit ordinance makes a different requirement as to the equipment which has been inspected and approved by the federal government. Hence, there is a direct conflict between the federal legislation and the Detroit ordinance.

A sentence from *Hill v. Florida*, 325 U. S. 538, 541 (1945) is very appropriate here. That sentence is as follows: "It is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida."

On the same page appellees state:

> "Federal laws relating to the inspection and licensing of vessels engaged in coasting and interstate commerce are comprehensive * * *."

This statement is correct and leads to the conclusion that Congress, through its comprehensive action, has impliedly pre-empted the field, of inspecting and licensing vessels and their equipment, if it should be held that it did not expressly pre-empt the same.

On p. 14 of appellees' brief, they point out that in *Kelly v. Washington*, the State of Washington stated that it had no intention of enforcing any local regulation that would conflict with Federal law and appellees wish to emphasize that the record, in this case, does not show that the City of Detroit ever required any inspection or licensing of respondent's vessels. There is a distinction between stating an intention *not* to enforce invalid provisions and the mere failure to enforce certain provisions to date. Appellant, in its bill of complaint, alleged in Par. 11 that defendants (appellees here) have threatened to enforce the said ordinance (the smoke ordinance) against it and against the officers of its vessels, even where the emission of objectionable smoke cannot be prevented (R. 6). Appellees, in answering this allegation, admit that they intend to enforce the provisions of the smoke ordinance as they legally apply to appellant's vessels (R. 10). There is another explanation for appellees' failure to attempt to enforce the inspection and licensing provisions of the smoke ordinance against appellant. On October 22, 1951 the Attorney General of the State of Michigan gave an opinion to the effect that the control or abatement of smoke seems to be unavoidably intermingled with the power plant built into the ship, the fuel used and the method of firing and concluded

that a smoke ordinance could only be enforced against vessels engaged in interstate commerce where the smoke was a result of improper methods of firing or the improper use of equipment, 1951-52 *Report of Atty. Gen.*, 370. In view of this opinion, appellees made no attempt to enforce any of the provisions of the smoke ordinance as to vessels engaged in interstate commerce until late in 1955. This Opinion of the Attorney General was overruled in an Opinion dated August 6, 1956 and found in Volume II, 1956, *Report of Atty. Gen.*, 436. It is very likely that appellees had advance notice of this reversal and started the criminal proceedings, referred to in this case, in December of 1955. Appellees were thereupon enjoined from enforcing the ordinance as to appellant's vessels before they had an opportunity to attempt to enforce the other provisions of the ordinance against appellant. There is nothing in this record to bind the appellees not to enforce Secs. 2.16 or 2.17 or any other section of the smoke ordinance against appellant.

On p. 14 of their brief, appellees cite 69 Stat. 322 and draw some unwarranted conclusions from the same. The act merely provides that the Surgeon General is to prepare or recommend research programs for the study of eliminating or reducing air pollution and the Department of Health, Education and Welfare is granted authority to make grants in-aid to state and local government air pollution control agencies. Congress, to avoid any doubt, provided that it was not pre-empting the air pollution field by this act, but it is also clear that Congress was not in any way referring to or limiting the Steamship Inspection Acts.

Beginning on p. 16 of their brief, appellees argue that the City ordinance is severable. Appellees are practically agreeing with appellant's argument that Secs. 2.16 and 2.17 of the ordinance are inconflict with federal legislation,

but the argument of appellant was not limited to those two sections. It claims that Sec. 2.2A of the ordinance is also in conflict with federal legislation because that provision canont be complied with, when equipment approved by the United States Coast Guard is used. Appellant also claims that Sec. 2.20 of the ordinance is invalid as to it because that section provides that if there are three violations within any consecutive twelve month period, the Commissioner must seal the equipment unless improvements are made. Under this section vessels would be sealed even though they are using equipment approved by Congress. The penalty section or Sec. 3.2 of the ordinance provides fine and imprisonment for the use of equipment approved by Congress.

II.

IF CONGRESS HAS NOT EXPRESSLY PRE-EMPTED THE FIELD, THE DETROIT SMOKE ORDINANCE MATERIALLY AFFECTS INTERSTATE COMMERCE IN MATTERS WHERE UNIFORMITY IS NECESSARY.

On page 18 of their brief, appellees quote from *15 C. J. S.* 268 to the effect that the constitutional grant to Congress of power to regulate interstate commerce, although curtailing state power in some measure by its own force, does not forestall all state action affecting interstate commerce. The quotation from this same work, which is appropriate to our problem is *15 C. J. S.* 272:

> "As to subjects or forms of interstate commerce which are of national importance and require uniformity of regulation, state action is altogether inadmissible, even in the absence of federal action."

Appellees, on pp. 19 through 24, cite cases to support their quotation from *15 C. J. S.* 268, but the more recent cases

of *Kelly v. Washington*, 302 U. S. 1 (1937), *Morgan v. Virginia*, 328 U. S. 373 (1946), *Southern Pacific v. Arizona*, 325 U. S. 761 (1945), and *Freeman v. Hewit*, 329 U. S. 249 (1946) all seem to support the rule that where uniformity of regulation is required, state action is inadmissible whether or not Congress has acted. In this connection, it should be pointed out that appellant is arguing that the approval of the equipment on vessels requires uniform treatment, not that the control of smoke requires uniform treatment. Appellant claims that inasmuch as the control of the equipment on steamships requires uniform treatment, action, by the city which controls the equipment by preventing the use of certain equipment, is inadmissible.

If the case of *Bibb v. Navajo Freight Lines*, 359 U. S. 520 (1959), changes the rule, above contended for, to the extent of requiring the balancing of the local and national interests involved, the answer would be the same. Appellees did not attempt to rebut appellant's showing of the cost of complying with the present ordinance or its burden on interstate commerce nor did appellees in any way attempt to show what, if any, effect smoke, from vessels engaged in interstate commerce, has on the City. The City of Detroit, obviously, has many factories, thousands of apartment houses, stores, office and commercial buildings which are capable of emitting smoke. The Crapo docked at Detroit twenty-two times in 1955, for an average docking time of twenty-four hours, and the Boardman docked at Detroit twenty-five times during the same year, with an average stay of 16.2 hours (R. 19). These two vessels were charged with emitting smoke for a period of nine to ten minutes on December 12, 1955 (R. 18). There was no showing, on the part of appellees, how often this occurred, nor was there any showing whether vessels merely passing Detroit, and not docking, violated the ordinance or the

extent of their violation. It is very possible that the smoke emitted by vessels engaged in interstate commerce would be negligible when compared to the total smoke and fumes emitted in the City.

On page 28 of their brief, appellants argue that only the Detroit ordinance is before the Court. Where it is claimed that a matter requires uniform treatment, the Court may always consider the possibility of action by other states or municipalities, at least to determine whether or not uniformity of treatment is necessary. If the matter does require uniform treatment, action by a city materially burdening interstate commerce is invalid even though only one ordinance or one statute is before the Court.

At the bottom of page 30 of their brief, appellees argue that uniformity is not necessary as to the control or abatement of smoke. Appellant agrees with this, but submits that is not the point. Appellant is arguing that the control and approval of equipment and vessels, engaged in interstate commerce, requires uniform treatment. Appellant submits that navigation, in interstate commerce, would soon cease if every state and all of its subdivisions could control the vessels and their equipment by specifying that only those vessels or equipment could be used which meet their requirements.

CONCLUSION

Appellant respectfully submits that it is entitled to the relief prayed for in the conclusion of its main brief.

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February 19, 1960.